TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1924

No. [redacted] 308

MODERN WOODMEN OF AMERICA, PETITIONER,

vs.

JENNIE VIDA MIXER

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

PETITION FOR CERTIORARI FILED MARCH 6, 1925

ORDER GRANTING PETITION FILED APRIL 20, 1925

(30,171)

Bylaw 66 is in substance & effect rather more than a mere evidence

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(30,171)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 861

MODERN WOODMEN OF AMERICA, PETITIONER,

vs.

JENNIE VIDA MIXER

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 9, 1924

[fol. 1] Caption in Supreme Court of Nebraska omitted

[fols. 2 & 3] [Caption omitted]

[fol. 4] [File endorsement omitted]

IN THE DISTRICT COURT OF DAKOTA COUNTY, NEBRASKA

JENNIE VIDA MIXER, Plaintiff,

vs.

MODERN WOODMEN OF AMERICA, Corporation, Defendant.

PETITION—Filed October 7, 1921

Comes now the plaintiff and for cause of action alleges and states;

1. That the defendant, The Modern Woodmen of America, a fraternal beneficiary society, is incorporated, organized and doing business under the laws of the State of Illinois and is also doing a life insurance business under and by virtue of the laws of The State of Nebraska.

2. That on or about the 18th day of November, 1901 the defendant by its policy of insurance No. 842,861 and a consideration or payment of certain premiums, at certain times, did insure the life of Walter Crocker Mixer in the sum of $2,000.00, to be paid in case of his death to the plaintiff, his wife, Jennie Vida Mixer. A copy of said policy is hereto attached and marked, "Exhibit A" and made a part of this petition.

3. Plaintiff further states, that the said Walter Crocker Mixer, while living at Sioux City, Iowa, with his wife and family disappeared in the month of September, 1910 and that the plaintiff nor any of her family ever heard of the whereabouts of the said Walter Crocker Mixer, since said time, except in February, 1911, the plaintiff received a letter from the said Walter Crocker Mixer, stating that he was in a hospital at Midland, South Dakota; that the said plaintiff has made inquiry and investigation and finds that there was [fol. 5] not any hospital at Midland, South Dakota at that time. That the said plaintiff and the members of her family have never heard from the said Walter Crocker Mixer, since February, 1911. Plaintiff further states that she has written and inquired of all the brothers and sisters of Walter Crocker Mixer and any of the relatives that she knew and also has inquired at different places where she thought the said Walter Crocker Mixer might be and the said investigation and inquiry has not disclosed the whereabouts of the said Walter Crocker Mixer. That the said Walter Crocker Mixer has been absent from his home and place of residence for over seven (7) years, last past, and said absence has been continued and unexplained and that by reason of said facts said Walter Crocker Mixer is presumed to be dead.

4. Plaintiff further states that she has paid all of the assessments levied against said insurance policy and that all assesments are now paid, in full. Plaintiff further states that in 1912, soon after the disappearance of said Walter Crocker Mixer, she informed the said defendant of the fact and she had considerable correspondence with the said defendant and the defendant with her, concerning the disappear- of the said Walter Crocker Mixer. That on the 9 day of September 1921 she sent to the defendant an affidavit respectfully asking for the $2,000.00 due under said life insurance policy. A copy of said affidavit is hereto attached, marked, "Exhibit B," and made a part of this petition. That said affidavit was duly received by the said defendant and they have refused to pay the plaintiff the amount due under said life insurance policy, which is marked, "Exhibit A," and made a part of this petition. Plaintiff further states that the defendant refused to pay her the sum of $2,000.00 due under said life insurance policy.

Wherefore plaintiff prays judgment against said defendant for the sum of $2,000.00 and interest from 9 day of September, 1921 at 7 per cent and costs of suit.

Geo. W. Leamer. Attorney for Plaintiff.

[fol. 6] Jurat showing the foregoing was duly sworn to by Jennie Vida Mixer omitted in printing.

EXHIBIT A TO PETITION

Form 135

Notice

A social Neighbor transferring to Beneficiary membership, under the provisions of Section 72 of the 1901 By-Laws, is liable for the assessment current on date borne by the Benefit Certificate, therefore the first liability under this certificate is for assessment No. 11.

C. W. Hawes, Head Clerk M. W. of A.

842,861. Age, 42. Rate, $1.05. Amount, $2,000.00

Benefit Certificate, Modern Woodmen of America

The Modern Woodmen of America, a Fraternal Beneficiary Society, incorporated, organized, and doing business under the laws of the State of Illinois, hereby certifies: That neighbor Walter Crocker Mixer, a member of Forest Camp No. 1957 of the Modern Woodmen of America, located at Elk Point, County of Union and State of South Dakota is, while in good standing, entitled to the [fol. 7] privileges of this society, and his beneficiary or beneficiaries hereinafter named shall, in case of his death, while a beneficial

member of this society, in good standing, be entitled to participate in the Benefit Fund of this society to the amount of two thousand dollars, to be paid to the said beneficiary or beneficiaries, to-wit: Jennie Vida Mixer related to said member in the relationship of wife. Provided, however, that all the conditions contained in this Certificate, and the By-Laws of this society, as the same now exist, or may be hereafter modified, amended, or enacted, shall be fully complied with; and provided, further, that in the event of the death of any beneficiary prior to the death of said Neighbor, and upon his failure to designate another beneficiary, then the amount to be paid under this certificate shall be due and payable to the other surviving beneficiaries, if any there be; or, if none survive him, then to the wife of such member, if she survive him; or, in case he has no surviving wife, to his legal heirs. Said fund, out of which any liability hereon, as well as all other mortuary liability, shall be paid, shall be created by levying upon all members of this society sufficient assessments, from time to time, to pay all such liability in full.

This Benefit Certificate is issued and accepted only upon the following expressed warranties, conditions, and agreements:

1. That the Modern Woodmen of America is a Fraternal Beneficiary Society, incorporated, organized and doing business under the laws of the State of Illinois, and legally transacting such business in the state where said member resides; that the application for membership in this society made by the said member, a copy of which is hereto attached and made part hereof, together with the report of the Medical Examiner which is on file in the office of the Head Clerk, and is hereby referred to and made part of this contract, is true in all respects, and that the literal truth of such applica- [fol. 8] tion, and each and every part thereof, shall be held to be a strict warranty and to form the only basis of the liability of this society to such member, and to his beneficiary or beneficiaries, the same as if fully set forth in this benefit certificate.

2. That if said application shall not be literally true in each and every part thereof, then this benefit certificate shall, as to the said member, his beneficiary or beneficiaries, be absolutely null and void.

3. This certificate is issued in consideration of the warranties and agreements made by the person named in this certificate in his application to become a member of this society, and also in consideration of the payment made when adopted as a Neighbor in prescribed form, and his agreement to pay all assessments and dues that may be *lievied* during the time he shall remain a member of this society.

4. If payments assessed against the said member are not paid to the Clerk of the Camp of which he is or hereafter may be a member, on or before the first day of the month following the date of the notice of levey of the same, then this certificate shall be null and void, and shall so continue of no effect until payment is made in

pursuance of the requirements of the By-Laws of this society as the same *nwo* exist; subject, however, to change from time to time, as the same may be affected by the enactment of new By-Laws or the modification or amendment of any now in force.

5. If the member holding this certificate shall be expelled from this society, or become intemperate in the use of alcoholic drinks, or in the use of drugs or narcotics, or if he shall be or become engaged in the manufacture or sale of malt, spirituous or vinous liquors to be used as a beverage, in the capacity of proprietor, stockholder, agent or servant, or if he shall be convicted of a crime or felony, the punishment for which may be imprisonment in the pen*i*tentiary, after being adopted into this society, or if he shall, [fol. 9] within three years after becoming a beneficial member of this society, die by his own hand, whether sane or insane, *of* if his death shall occur in consequence of a duel, or of any violation or attempted violation of the laws of any state or territory or of the United States, or by the hands of his beneficiary *of* beneficiaries (except by accident), or if his said application for membership or any part of it shall be found in any respect untrue, then this certificate *sah*ll be null and void and of no effect, and all moneys which have been paid and all rights and benefits which may have accrued on account of this certificate, shall be absolutely forfeited and this certificate become null and void.

6. No action can or shall be maintained on this certificate until after the proofs of death and claimant's rights to benefits as provided for in the By-Laws of this society have been filed with the Head Clerk, and passed upon by the Board of Directors, nor unless brought within eighteen months from the date of the death of the member.

7. If said member shall enter upon or follow any of the employments or occupations mentioned in Section 14 of the By-Laws of this society, now in force or as hereafter amended, this certificate shall, so far as the same is intended to provide for the payment of benefits, become, ipso facto, null and void as to any claim growing out of or made on account of the death of said member by accident directly traceable to *to* employment in such hazardous occupation, or from any disease directly traceabl*t* thereto; Provided, that if the occupation engaged in was not prohibited by the laws of this society at the date of the issuance of said member's certificate, nor at the time he engaged therein, the provisions of this clause shall not apply.

8. This certificate and contract is and shall be subject to forfeiture for any of the causes of forefeiture which are now prescribed in the By-Laws of this society, or for any other cause or [fol. 10] causes of forefeiture which may hereafter be prescribed by this society by amendment of said By-Laws.

In witness whereof, the said Modern Woodmen of America, has, by its Head Counsul and Head Clerk, signed, and caused the cor-

porate seal of said corporation to be affixed to this certificate at the City of Rock Island, in the State of Illinois, this Eighteenth day of November, 1901.

C. W. Hawes, Head Clerk. W. A. Northcott, Head Counsul. (Seal.)

Member adopted and certificate delivered this 20th day of November, 1901.

F. D. Smythe, Clerk, C. G. Vollmer, Counsul, Forest Camp No. 1957, M. W. of A.

I hereby accept the above Benefit Certificate and agree to all the conditions therein contained.

W. C. Mixer.

A copy of your application for membership is attached to this certificate. Read it. If any answer *of* statement therein is not correct notify the head clerk at once.

Attached to benefit certificate, is the following:

Form No. 106½, Edition 8, Aug. 1, 1899

This page must be filled out by applicant before medical examination. The Clerk of Camp will next (read this note) certify to applicant's election to membership. Applicant must then complete this application in the presence of and with the aid of the Camp Physician.

Application for Membership and Benefit in Modern Woodmen of America, a *Fraternal* Beneficiary Society, Incorporated, Organized, and Doing *Subiness* under the Laws of Illinois.

Elk Point, State of So. Dak., Nov. 4, 1901.

[Vol. 11] To the Head Camp Modern Woodmen of America and to the Members of Forest Camp, No. 1957, located at Elk Point, County of Union, State of So. Dak.:

I hereby make application for membership in your Camp and the Society of Modern Woodmen of America, and for indemnity in case of my death while a member in good standing of said Society in the sum of $2,000.00.

For such purpose I hereby tender to said Society the following true and complete answers and statements:

1. I reside at Elk Point State of So. Dak., at No. — Street, and within the jurisdiction of the Camp above named, as defined in Sec. 231 of the By-Laws of said Society.

2. I was born in the State of Wis. on the 18 day of May, 1859, and therefore am now between 42 and 43 years of age. Are you Married? Yes.

3. What is your occupation? Retail treeman. Place of business? Elk Point. Do you work for wages or salary? Wages. Give name of your employer. C. I. Rofter. What is your employer's business? Nursery Mah.

4. I am engaged in an honorable and lawful business or vocation, and I am not now directly or indirectly engaged in any of the following occupations prohibited by the By-Laws of said Society, viz; Manufacture or sale of spirituous, malt or vinous liquors as a beverage, in the capacity of proprietor, stockholder, agent or servant; railroad freight brakeman, railroad freight conductor, railroad locomotive engineer, railroad fireman, railroad switchman, railroad switch tender, railroad yardmaster, railroad yard foreman, miner employed underground mine inspector, mine track layer, pit boss, professional rider or driver in races, employee in any factory where gun-powder, nitroglycerine, dynamite, or other dangerous explosive is manufactured, glass blower, oil well "shooter," aeronaut, sailor on the great lakes or seas, brass finisher, plow polisher or plow grainder in plow factories, professional baseball player, professional fireman [fol. 12] (Menaing thereby a member of a paid city fire department, depending upon such employment as a principal means of support), submarine operator, actual military or naval service in time of war, employee in slag furnace in lead works, color and white lead factory employee, or steel blaster; none of the duties incident to any of the foregoing prohibited occupations are among the duties of my present employment, or of my usual vocation, and I agree that I will not hereafter, while a member of this society, engage in any of these occupations, except at the same time recognizing the full force of the Society's law limiting or extinguishing its liability upon the certificate of any member engaging in such occupations.

5. I agree to make payment of all dues and assessments legally levied, within the limit of time provided by the Society's Law, and to conform in all respects to the laws, rules, and usages of the Society now in force, or which may hereafter be enacted and adopted by same; and that this application and the laws of this Society shall form the sole basis of my admission to and membership therein, and of the Benefit Certificate to be issued me by said Modern Woodmen of America; that any untrue statement or answer, or any concealment of facts, intentional or otherwise, in this application (including therein next succeeding page), or my being suspended or expelled from or voluntarily severing my connection with the Society, shall forfeit the rights of myself and that of my beneficiaries to any and all benefits and privileges growing out of my membership in said Society.

6. I am a believer in a Supreme Being. I fully understand the objects, organization, mode of government, and the laws of this Society, and particularly that part of the Laws defining the qualifications for and the restrictions upon its membership, and that providing for the forefeiture of indemnity for untrue statements or answers in an application for membership. I furher understand and agree that the laws of this Society now in force, or hereafter

enacted, enter into and become a part of every contract of indemnity [fol. 13] by and between the members and the Society, and govern all rights thereunder; and I further understand and agree that this Society does not indemnify against death from suicide, sane or insane, if occurring within three years from date of certificate, or from death resulting from occupations prohibited by its laws.

7. I direct that the Benefit Certificate which may be issued to me in pursuance of this application recite as beneficiaries the following named, and to each the amount designated, whose relationship to me I certify to by as stated, viz: $2,000.00 to (Name:) Jennie Vida Mixer, (Residence:) Elk Point, State of So. Dak., (Relations:) wife.

8. Is this application for original membership? No. Or for restoration of membership, having been in suspension more than six months? Yes. Or for increase in certificate or for transfer from social to beneficiary?

9. Have you ever been a member of this Society? Yes. If so, give location of your Camp. State of Iowa, Maynard. Camp No. Don't know. Give date of adoption. Don't know.

10. Have you heretofore made application for membership in this Society and failed to complete the same? No. Give location and number of the Camp. ——. If so, state why you failed to become a member. ——.

11. Have you at the present any life insurance? No. If so, name companies or societies and amounts carried by you in each. ——.

12. Have you ever been rejected by any life insurance company or companies, mutual benefit association or associations, or fraternal beneficiary society or societies? No. If so, give name of same and the year you were rejected. ——.

13. Has any examining physician for life insurance company, association, or society ever declined to recommend your application? No. If so, give such physician's name and address. ——. Have you ever made application for life insurance or beneficiary indem- [fol. 14] nity, and withdrawn such application before final action? No. If so, give name of company or companies, association or associations, society or societies, and years.

14. Have you within the last seven years been treated by or consulted any physician, in regard to personal ailment? No. If so, give *give* dates, ailment, and physician's or physicians' name and address. ——.

15. Are you now of sound body, mind and health, and free from disease or injury; of good moral character and exemplary habits? Yes.

16. Has your weight recently increased? No. Or diminished? No. How much? ——. When? ——. Have you ever had any

local disease, personal injury or serious illness? No. If so, explain fully, giving dates. ——.

17. Do you abstain entirely from the use of intoxicating liquors? No. State when last intoxicated? Never. State kind and quantity of liquor consumed daily? One glass of beer per week. Have you ever taken any treatment for the cure of the liquor habit? No. Date, ——.

18. Do you abstain entirely from the use of tabacco? No. If not, what quantity do you consume per week? Smoke 2 cigars daily.

19. Do you now use or have you ever used any form of opium, morphine, cocaine, or other narcotics? No. If so, state the kind and quantity. ——.

20. Have you ever taken any treatment for tabacco, morphine, cocaine, or opium habit? Date, ——.

21. Have you been an inmate of any infirmary, sanitarium, retreat, asylum, or hospital? No. If so, where? ——. When? ——. Duration? ——. For what cause? ——.

22. Have you ever applied for or received a pension? No.

I direct that the official paper be mailed to me at address given below until I shall notify the Head Clerk to change same.

Walter Crocker Mixer, Applicant. J. E. R., Witness to Signature.

[fol. 15] Recommended by —— ——. P. O. Address: No. — Street, Elk Point, State of So. Dak. Date: Nov. 21*th*, 1901.

Read This

The answers to the following questions must be made by the applicant and written under his direction by the local Camp Physician, who, upon completion of the same, and after applicant has attached his signature, shall return it to the Clerk or Deputy Head Consul, who will mail it to the Head Physician of the Medical District in which the Camp is located, with his fee of 25 cents enclosed.

23. Have you ever had inflamed or swollen joints from rheumatism? No. If so, give number, dates, and duration of attacks. ——.

24. Are you ruptured? No. If so, what kind? Has it been strangulated? ——. Do you now and will you continually wear a truss? ——. Is rupture perfectly retained? ——.

25. Have you had small-pox? No. Varioloid? No. Have you been successfully vaccinated? Yes. If not, do you agree that any certificate issued to you by this Society shall be void if you die of either small-pox or varioloid? ——.

26. Have you ever lived in the family with, or nursed any person who was afflicted with or died from consumption? No. If so, when? ——.

27. Have you ever had any disease of the following named organs or any of the following named diseases or symptoms? Answer yes or no to each: Abscess? No. Discharge from ear? No. Gravel? No. Paralysis? No. Agye? No. Disease of bladder? No. Habitual headache? No. Dizziness or vertige? No. Habitual coughing? No. Pneumonia? No. Piles? No. Appoplexy? No. Asthma? No. Dropsy? No. Heart? No. Inflammatory rheumatism No. Brain? No. Dyspepsia? No. Indications of insanity? No. Scrofula? No. Bronchitis? No. Enlarged veins? No. Ja-ndice? No. Spinal disease? No. Cancer? No. Epilepsy? No. Kidney disease? No. Spitting blood or other hemorrhages? No. Catarrh? [fol. 16] No. Fistula? No. Liver No. Stricture? No. Chronic diarrhea? No. Fits? No. Lungs? No. Sunstroke? No. Consumption? No. Gall stone? No. Neuralgia? No. Syphillis? No. Diphtheria? No. Giotre? No. Open sores? No. Tumors? No. Remarks: ——.

28. State your family history in answer to the following particulars:

In giving "Cause of Death," avoid all indefinite terms such — "Fever," "General Debility," "Exposure," etc. If the word "Childbirth" be used, specify how long after delivery the death occurred, and whether it was accompanied by any disease of the Chest.

Family Record

	Present age	Present condition of health
Is your father living?.....	84	Good.
Is your Mother living?.....	78	Good.
How many brothers living.....	45	Good.
1. (If none, so state.)		
How many Sisters living?.....	53	Good.
(If none, so state).....	38	Good.
Is Father's Father living?.....	..	.....
Is Father's Mother living?.....	..	.....
Is Mother's Father living?.....	..	.....
Is Mother's Mother living?.....	..	.....

[fol. 17]

Family Record

	Was tuberculosis a factor?	Age of	Cause of death	Duration of last illness	Previous health
Is your father dead?.....	...	..	.....	.....	.....
Is your mother dead?.....	...	..	.....	.....	.....
How many Brothers dead? (If none, so state.) How many Sisters dead? (If none so state).....	No.	35	Sunstroke.	2 wks.	Good.
Is Father's Father dead?.....	...	80	Old Age.	Don't know.	Good.
Is Father's Mother Dead?.....	...	83	" "	" "	"
Is Mother's Father dead?.....	...	75	" "	" "	"
Is Mother's Mother dead?.....	...	91	" "	" "	"

If other than first-class, give particulars, and state whether tuberculosis is or was a factor.

Have any of your near relatives committed suicide? No. Or been afflicted with consumption? No. Insanity? No. Cancer? No. Or other constitutional or hereditary disease? No. If so, explain fully. ——.

Applicant Will Please Note this Clause

I have verified each of the foregoing answers and statements from 1 to 28 both inclusive, adopt them as my own, whether written by me or not, and declare and warrant that they are full, complete, and literally true, and I agree that the exact literal truth of each shall be a condition precedent to any binding contract issued upon the faith of the foregoing answers. I further agree that the foregoing answers and statements, together with the preceding declaration, shall form the basis of the contract between me and Modern Woodmen of America, and are offered by me as a consideration for the contract applied for, and are hereby made a part of any Benefit Certificate that may be issued on this application, and shall be deemed and taken as a part of such Certificate; that this application may be referred to in said Benefit Certificate as the Basis thereof, and that they shall be construed together as one entire contract; and I further agree that if any answer or statement in this application is not literally true, or if I shall fail to comply with *any* conform to any and all of the laws of said Modern Woodmen of America, whether now [fol. 18] in force or hereafter adopted, that my Benefit Certificate shall be void. And I waive for myself and beneficiaries all claim of benefit under this application until it shall be approved by the Head Physician and I shall be regularly adopted in accordance with the ritual of this Society, and shall make the payments as required by its laws at adoption; and any certificate which shall be issued to me in pursuance of this application shall be delivered to me after adoption and while in sound health, and in pursuance of the By-Laws of the Society. And I hereby expressly waive for myself and beneficiaries the privilege or benefits of any and all laws which are now or may be hereafter in force making incompetent the testimony of or disqualifying any physician from testifying concerning any information obtained by him in professional capacity. And I further expressly waive for myself and my beneficiary or beneficiaries the provisions of any law, and the statutes of any state, now in force or that hereafter may be enacted, that would, in the absence of this agreement, modify or conflict with my contract with this Society, or cause it to be construed in any way contrary to its express language.

Date Nov. 4, 1901.

Walter Crocker Mixer, Applicant.

Answers written by J. C. Rhoden, M. D.

Exhibit B to Petition

State of Nebraska,
County of Dakota, ss:

I, Jennie Vida Mixer of lawful age, being first duly sworn deposes and says that she was the wife of Walter Crocker Mixer, and the beneficiary under benefit certificate number 842,261 of the Modern Woodmen of America, a Fraternal Beneficiary Society; that the said Walter Crocker Mixer, was a member of the Forrest Camp, number 1957 of the Modern Woodmen of America at Elk Point, Union County, South Dakota, and said benefit certificate was dated November 18, 1901, and was for the amount of $2,000.00.

[fol. 19] Affiant further states that the said Walter Crocker Mixer disappeared in the month of December, 1910, and last heard from by his wife or any person was in the month of February, 1911, when he wrote that he was in a hospital at Midland, South Dakota; that said affiant and her family have made inquiries and have never heard where the said Walter Crocker Mixer is or where he went to from there since February, 1911.

Affiant further states that she has paid all assessments and dues under and by virtue of such benefit certificate, and that the said Walter Crocker Mixer has been absent from his home continuously, and his whereabouts have not been known since the month of February, 1911. Affiant, Jennie Vida Mixer, who is the beneficiary under said benefit certificate respectfully claims the $2,000.00 due under said certificate and asks that the same be paid to her; that she has said benefit certificate in her possession and is ready to surrender the same upon said payment.

Jennie Vida Mixer.

Subscribed in my presence and sworn to before me this 9 day of September, 1921. Geo. W. Leamer, Notary Public. My commission expires June 12, 1922. (Seal.)

[File endorsement omitted.]

District Court of Dakota County, State of Nebraska

[Title omitted]

Answer—Filed November 8, 1921

[fol. 20] Comes now the defendant, Modern Woodmen of America, and for answer to plaintiff's petition alleges and shows to the Court:

(1) Defendant admits that it is a corporation organized under the laws of the State of Illinois, but denies that it is doing a life

insurance business under and by virtue of the laws of the State of Nebraska.

Admits that on or about the 18th day of November, 1901, the defendant issued its Benefit Certificate No. 842,861 for the sum of Two Thousand Dollars ($2,000) to be paid in the event of the death of Walter Crocker Mixer to his wife, Jennie Vida Mixer. The defendant admits a copy of said certificate is attached to plaintiff's petition and made a part of said petition.

Defendant denies that the said Walter Crocker Mixer, while living at Sioux City, Iowa, with his wife and family, disappeared in the month of September, 1910, and denies that the plaintiff, or any of her family have never heard of the whereabouts of the said Walter Crocker Mixer since that time.

Defendant denies that the plaintiff received a letter from the said Walter Crocker Mixer stating he was in the hospital at Midland, South Dakota; and denies that the plaintiff and the members of her family have never heard from the said Walter Crocker Mixer since February, 1911; denies that the plaintiff has made inquiry at different places where she thought the said Walter Crocker Mixer might be, and denies that the said defendant has not knowledge of the whereabouts of the said Walter Crocker Mixer; denies that the said Walter Crocker Mixer has been absent from his home and place of residence for seven years last past and said absence has been continuous and unexplained, and denies that the said Walter Crocker Mixer is dead.

Defendant admits that the plaintiff has paid all assessments up to the commencement of this action.

Defendant denies each and every allegation and averment, and each and every part thereof, contained in plaintiff's petition ex-
[fol. 21] cept as herein expressly admitted to be true.

Division I

Defendant further answering, and for its first affirmative ground of defense to plaintiff's alleges cause of action, says that it is, and during all of the times in plaintiff's petition mentioned, has been a fraternal beneficiary society organized, incorporated and existing under and by virtue of the laws of the State of Illinois, and operating under a charter granted by the state of Illinois; that at all of the times mentioned in plaintiff's petition this defendant was a fraternal beneficiary society as defined in, and duly transacting business in compliance with the provisions of an Act of the General Assembly of the State of Illinois, enacted and in force from and after the 22nd day of June, 1893, entitled:

"An Act to provide for the organization and management of fraternal beneficiary societies for the purpose of furnishing life indemnity or pecuniary benefits to beneficiaries of deceased members or accident or permanent indemnity disability to members thereof; and to control such societies of this State, and providing and fixing the punishment for violation of the provisions thereof, and to repeal all laws now existing which conflict herewith."

That Section I of said Act is as follows:

Section 1. Be it enacted by the People of the State of Illinois, represented by the General Assembly; That a fraternal Beneficiary society is hereby declared to be a corporation or association formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit. Each society shall have a lodge system with ritualistic form of work and representative form of government, and shall make provision for the payment of death benefits and may, in addition thereto, provide for the payment by local Lodges [fol. 22] of benefits in case of sickness, disability, or old age, of its members, subject to their compliance with its constitution and laws. The fund from which the payment of such benefits shall be made, and the fund from which the expenses of such association shall be defrayed, shall be derived from assessments or dues collected from its members. Payment of death benefits shall only be made to the families, heirs, blood relations, affianced husband or affianced wife of, or to persons dependent upon the member; and such benefits shall not be willed, assigned or otherwise transferred to any other person. All such societies shall be governed by this act, and shall be exempt from the provisions of all insurance laws of this state, and no law hereafter passed shall apply to them unless they be expressly designated therein."

Defendant further alleges that it is and was at all of the times in plaintiff's petition mentioned, a corporation formed, organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit, having a lodge system, with ritualistic form of work and representative form of government, and makes provision for the payment of death benefits, subject to compliance by its members with its constitution and laws; that the fund from which the payment of such benefits is made, and the fund from which the expenses of the Society are defrayed is derived from assessments and dues collected from its members. That it makes payment of death benefits to the families, heirs, blood relations of, or to persons dependent upon its members.

Defendant further alleges that it now is, and was at all of the times in plaintiff's petition mentioned, transacting business as a fraternal beneficiary society in the State of Nebraska, and that it has at all times complied in all respects with the provisions and regulations of the laws of Nebraska, and is duly and regularly licensed to transact business in the State of Nebraska as a fraternal beneficiary society pursuant to said laws.

[fol. 23] Defendant further alleges that plaintiff's alleges cause of action is found on a contract made and entered into between Walter Crocker Mixer, mentioned in plaintiff's petition, and this defendant, which said contract is composed of (1) the charter and articles of association of Modern Woodmen of America and the statute of the State of Illinois in force at the time of the organization of the defendant and at all times thereafter, which are a part of said Charter of defendant, (2) the by-laws, rules and usages of Modern Woodmen of America in force at the time the said Walter Crocker Mixer be-

came a member of the defendant, together with all by-laws, laws, rules, and usages thereafter enacted by this defendant, (3) the application of said Walter Crocker Mixer for membership in this defendant, and (4) the Benefit certificate issued by this defendant to the said Walter Crocker Mixer, and herein sued on.

Defendant further alleges that on the 4th day of November, 1901, the said Walter Crocker Mixer made application for membership in the defendant through Forest Camp No. 1957 a subordinate lodge of this defendant located at Elk Point, State of South Dakota, and then and there filed a written application for membership, wherein he answered, warranted and agreed, among other things, as follows:

"I hereby make application for membership in your Camp and the Society of Modern Woodmen of America, and for indemnity in case of my death while a member in good standing of said Society in the sum of $2,000.00.

I reside at Elk Point, State of South Dakota, and within the jurisdiction of the Camp above named, as defined in Sec. 231 of the By-Laws of said Society.

I was born in the State of Wisconsin on the 18th day of May, 1859, and therefore am now between 42 and 43 years of age. Are you married? Yes.

I agree to make payment of all due and assessments legally levied, [fol. 24] within the limit of time provided by the Society's law and to conform in all respects to the laws, rules and usages of the Society now in force or which may hereafter be enacted and adopted by the same; and that this application and the laws of this Society shall form the sole basis of my admission to and membership therein, and of the Benefit Certificate to be issued me by said Modern Woodmen of America; and that any untrue statement or answer, or any concealment of facts, intentional or otherwise, in this application (including therein next succeeding page) or my being suspended or expelled from or voluntarily severing my connection with the Society, shall forfeit the rights of myself and that of my beneficiaries to any and all benefits and privileges growing out of my membership in said Society.

I am a believer in a Supreme Being. I fully understand the objects, organization, mode of government, and the laws of this Society, and particularly that part of the laws defining the qualifications for and the restrictions upon its membership, and that providing for the forfeiture of indemnity for untrue statements or answers in an application for membership. I further understand and agree that the laws of this Society now in force, or hereafter enacted, enter into and become a part of every contract of indemnity by and between the members and the Society, and govern all rights thereunder; and I further understand and agree that this Society does not indemnify against death from suicide, sane or insane, if occur-ing within three years from date of certificate, or from death resulting from occupations prohibited by its laws.

I direct that the Benefit Certificate which may be issued to me in

pursuance of this application, recite as beneficiaries the following named, and to each the amount designated, whose relationship to me I certify to be as stated, viz; $2,000 to Jennie Vida Mixer, Elk Point, State of South Dakota. Wife.

I have verified each of the foregoing answers and statements from 1 to 28, both inclusive, adopt them as my own, whether writ- [fol. 25] ten by me or not, and declare and warrant that they are full, complete and, literally true, and I agree that the exact, literal truth of each shall be a condition precedent to any binding contract issued upon the faith of the foregoing answers. I further agree that the foregoing answers and statements, together with the preceding declaration, shall form the basis of the contract between me and the Modern Woodmen of America, and are offered by me as a consideration for the contract applied for, and are hereby made a part of any Benefit Certificate that may be issued on this application, and shall be deemed and taken as a part of such certificate; that this application may be referred to in said Benefit Certificate as the basis thereof, and that they shall be construed together as one entire contract; and I further agree that if any answer or statement in this application is not literally true, or if I shall fail to comply with and conform to any and all of the laws of said Modern Woodmen of America, whether now in force or hereafter adopted, that my Benefit Certificate shall be void. And I waive for myself and beneficiaries all claim of benefit under this application until it shall be approved by the Head Physician and I shall be regularly adopted in accordance with the ritual of this Society, and shall make the payments as required by its laws at adoption; and any Certificate which shall be issued to me in pursuance of this application shall be delivered to me after adoption and while in sound health, and in pursuance of the By-Laws of the Society. And I hereby expressly waive for myself and beneficiaries the privilege of benefits of any and all laws which are now or may be hereafter in force making incompetent the testimony of or disqualifying any physician from testifying concerning any information obtained by him in a professional capacity. And I further expressly waive for myself and my beneficiary or beneficiaries the provisions of any law, and the statutes of any state, now in force or that hereafter may be enacted, that would, in the absence of this [fol. 26] agreement, modify or conflict with my contract with this Society, or cause it to be construed in any way contrary to its express language."

Defendant further alleges that the said application was the basis of, and consideration for, a certain benefit certificate, No. 842861, issued by this defendant to the said Walter Crocker Mixer on the 18th day of November, 1901, and thereafter delivered to and accepted by the said Walter Crocker Mixer, a copy of which said Benefit Certificate is attached to plaintiff's petition and marked Exhibit "A," and the same is hereby referred to and made a part of defendant's answer the same as if herein incorporated and repeated;

that said Benefit certificate has and contains, among other things, the following provisions, to-wit:

"The Modern Woodmen of America, a fraternal beneficiary society incorporated, organized, and doing business under the laws of the State of Illinois, hereby certifies; That Neighbor Walter Crocker Mixer, a member of Forest Camp, No. 1957 of the Modern Woodmen of America, located at Elk Point, in the County of Union and State of South Dakota, is, while in good standing, entitled to the privileges of this Society, and his beneficiary or beneficiaries hereinafter named shall, in case of his death while a beneficial member of this society in good standing, be entitled to participate in the benefit fund of this society to the amount of $2,000 without interest, to be paid to the said beneficiary or beneficiaries, to-wit; Jennie Vida Mixer, related to said member in the relationship of wife; provided however, that all the conditions contained in this certificate and the by-laws of this society, as they now exist or may be hereafter modified, amended, or enacted, shall be fully complied with; and provided further, that in the event of the death of any beneficiary prior to the death of said neighbor, and upon his failure to designate another beneficiary, then the amount to be paid under [fol. 27] this certificate shall be due and payable to the other surviving beneficiaries, if any there by or if none survive him, then to the wife of such member is she survive him, or, in case he has no surviving wife, to his legal heirs. Said fund out of which any liability hereon, as well as all other mortuary liability shall be paid, shall be created by levying upon all beneficial members of this Society sufficient assessments from time to time to pay all such liability in full.

This benefit certificate is issued and accepted only upon the following express warranties, conditions, and agreements:

1. That the Modern Woodmen of America is a Fraternal Beneficiary Society, incorporated, organized, and doing business under the laws of the State of Illinois, and legally transacting such business in the state where said member resides. That the application for membership in this society made by the said member, a copy of which is hereto attached and made part thereof, together with the report of the Medical Examiner, which is on file in the office of the Head Clerk, and is hereby referred to and made a part of this contract, is true in all respects, and that the literal truth of such application, and each and every part thereof, shall be held to be a strict warranty and to form the only basis of the liability of this society to such member and to his beneficiary or beneficiaries, the same as if fully set forth in this benefit certificate.

3. This certificate is issued in consideration of the warranties and agreements made by the person named in this certificate in his application to become a member of this society, and also in consideration of the payment made when adopted as a neighbor in prescribed form, and his agreement to pay all assessments and dues

that may be levied during the time he shall remain a member of this society.

4. If payments assessed against the said member are not paid to the Clerk of the camp of which he is or hereafter may be a member on or before the first day of the month following the date of the notice of levy of the same, then this certificate shall be null and [fol. 28] void, and shall so continue of no effect until payment is made in pursuance of the requirements of the by-laws of this society as the same now exists, subject, however, to change from time to time, as the same may be affected by the enactment of new by-laws or the modification or amendment of any now in force.

6. No action can or shall be maintained on this certificate until after the proofs of death and claimant's right to benefits, as provided for in the by-laws of this society, have been filed with the Head Clerk and passed upon by the Board of Directors, now unless brought within eighteen months from the date of the death of the member."

Defendant further alleges that its by-laws duly and regularly enacted and in full force and effect at all times from and after the 1st day of September, 1908, have provided as follows:

"Sec. 66. Disappearance No Presumption of Death.—No lapse of time or absence or disappearance on the part of any member, heretofore, or hereafter admitted into the Society, without proof of the actual death of such member, while in good standing in the Society, shall entitle his beneficiary to recover the amount of his benefit certificate, except as hereinafter provided. The disappearance or long continued absence of any member unheard of, shall not be regarded as evidence of death or give any right to recover on any benefit certificate heretofore or hereafter issued by the society until the full term of the member's expectancy of life, according to the National Fraternal Congress Table of Mortality, has expired within the life of the benefit certificate in question, and this law shall be in full force and effect, any statute of any state or country or rule of common law of any state or country to the contrary notwithstanding. The term 'within the life of the Benefit certificate,' as here used, means that the benefit certificate has not lapsed or been forfeited, and that all payments required by the by-laws of the society have been made."

[fol. 29] Defendant further alleges that proof of the actual death of the said Walter Crocker Mixer has never been furnished to, or filed with the defendant and that the expectancy of life of the said Walter Crocker Mixer, according to the National Fraternal Congress Table of Mortality, had not expired at the time of the commencement of this suit, and has not expired and did not expire within the life of the said Benefit certificate herein sued on.

Defendant further alleges that under its Charter, granted by the State of Illinois, and under the laws of said state, it has authority

to adopt, alter, revise, and amend its by-laws; that ever since the organization and incorporation of this defendant, it was, and still is, the statute law of the state of Illinois that fraternal beneficiary societies, of which the defendant, Modern Woodmen of America, is one, may revise, alter and amend their by-laws; and that under and by the law of the State of Illinois as determined by its courts of competent jurisdiction, fraternal beneficiary societies, of which the defendant is one, have power to revise, amend and alter their by-laws; and that said revised and amended by-laws are binding upon the members thereof, and their beneficiaries; that the corporate power of the defendant, Modern Woodmen of America, and the plaintiff's rights, as well as the rights of any beneficiary depending upon the membership of Walter Crocker Mixer in defendant, are determined by the public acts of the State of Illinois, which authorize the defendant to alter, revise and amend its by-laws, and members of the defendant (including said Walter Crocker Mixer) and their beneficiaries are bound thereby; that under the statute law of the state of Illinois, as the same existed at all of the times herein mentioned, this defendant had the right and power to enact by-laws and said by-laws so enacted became a valid and existing part of the contracts between the Society and its members, and that the said Section 66 of defendant's by-laws so enacted, as aforesaid, was and [fol. 30] is a valid and existing part of the contract between the defendant and the said Walter Crocker Mixer, and binding upon the beneficiaries under his certificate; that pursuant to the provisions of Section 1, Article 4, of the Constitution of the United States, this Honorable Court is in duty bound to give full faith and credit to the public acts aforementioned of the State of Illinois, and to the interpretation thereof by the highest judicial court of the State of Illinois. And this defendant further alleges that if this Honorable Court should fail or refuse to hold that this defendant had the right to enact said by-laws (Sec. 66 aforesaid) and that the said by-law is valid and binding upon all the members of the defendant, including the said Walter Crocker Mixer, and their beneficiaries, there would be a failure on the part of this Honorable Court to give full faith and credit to the public acts of the State of Illinois and to the decision of the highest tribunal of said State, and that would be a violation of Section 1, Article 4, of the Constitution of the United States.

Defendant further alleges that on the 13th day of December, 1917, one Louisa W. Steen filed an action at law against this defendant, Modern Woodmen of America, in the Superior Court of Cook County, Illinois, and in her declaration for cause of action alleged that on the 15th day of January, 1897, this defendant issued a certain benefit certificate to one Albert F. Steen, payable on his death in the sum of $2 000 to Louisa W. Steen, his wife, as beneficiary; that thereafter on, to-wit, the 7th day of May, 1910, the said Albert F. Steen disappeared from his home in the City of Chicago, Illinois, and that he had been unaccountably absent ever since, and had never returned or been heard of since his departure, though

the plaintiff had made diligent search and inquiry for him; that on, to-wit, the 7th day of May, 1917, said absence of Albert F. Steen had continued seven years and on said date the said Albert F. Steen was presumed to be dead, and that the said Steen Died, to-wit, on the [fol. 31] 7th day of May, 1917; that thereafter plaintiff gave the defendant notice of the disappearance and continued absence of said Albert F. Steen for more seven years, and made claim for the said $2,000; that the said Albert F. Steen had paid all assessments and dues up to and including the month of May, 1917, and had complied in all respects with the constitution, by-laws and conditions of the said certificate, and was a mem'er in good standing of defendant society at the time of his death; that defendant refused to pay plaintiff's claim, wherefore plaintiff prayed judgment for the said sum of $2,000 with interest from the 7th day of May, 1917.

Defendant further alleges that thereafter, on January 9, 1918, it filed a second or special plea to plaintiff's declaration alleging that it was a fraternal beneficiary society; that plaintiff's suit was founded on a contract entered into between Albert F. Steen and the defendant, which consisted of the application of Al'ert F. Steen for membership in the defendant society, the by-laws of Modern Woodmen of America and the benefit certificate issued to said Steen; that on the 22nd day of December, 1896, the said Albert F. Steen made application for membership in the defendant society through Muscatine Camp, No. 106, a subordinate lodge of the defendant, located at Muscatine, State of Iowa, wherein he agreed to conform in all respects to the laws, rules and usages of the Order then in force or thereafter enacted; that said application was the basis of and consideration for a benefit certificate, No. 72769, issued to said Steen on the 15th day of January, 1897, which provided that the said Steen, a member of Muscatine Camp No. 106, located at Muscatine, Iowa, "is while in good standing in this fraternity entitled to participate in its benefit fund to an amount not to exceed $2,000, which shall be paid at his death to Louisa W. Steen, related to him as wife, subject to all the conditions of this certificate and by-laws of [fol. 32] this Order, and liable to forfeiture if said member shall not comply with said conditions, laws, and such by-laws and rules as are or may be adopted by the Head Camp of this Order from time to time." Said plea further alleged that by by-laws of the defendant, in force when said benefit certificate was issued, were subsequently amended and modified and from and after September 1, 1908, the by-laws contained Section 66 (as hereinbefore set forth), and the plea concluded with the allegation that proof of the actual death of said Steen had never been furnished to the defendant, and the expectancy of life of said Steen, according to the National Fraternal Congress Table of Mortality, had not expired.

Thereafter, on, towit, the 7th day of February, 1918, plaintiff filed a demurrer to defendant's said plea, alleging that said plea was not sufficient in law to constitute a defense to her action; that thereafter, on towit, the 1st day of June, 1918, the said Superior Court of Cook County entered the following judgment in said case of Louisa W. Steen vs. Modern Woodmen of America, to-wit:

"This cause coming on to be heard upon the demurrer of the plaintiff to the second or special plea of the defendant wherein the defendant sets up Section 66 of its by-laws providing that the disappearance or long continued absence of any member unheard of shall not be regarded as evidence of death or give any right to recover on any benefit certificate until the full term of the member's expectancy of life, according to the National Fraternal Congress Table of Mortality, has expired within the life of the benefit certificate in question, and providing for proof of the actual death of a member, the said demurrer of the plaintiff to said special plea is hereby overruled, to which order of the court, the plaintiff, by her attorneys, object and excepts, and plaintiff elects to stand by her demurrer to said special plea.

It is hereby further ordered that said cause be and the same is hereby dismissed at plaintiff's costs.

Therefore it is considered by the court that the defendant go hence [fol. 33] without day and do have and recover of and from plaintiff its costs and charges in this behalf expended and have execution therefor, to which order and judgment of the court plaintiff objects and excepts, and prays an appeal to the Appellate Court of the First District of Illinois, which appeal is hereby allowed upon the plaintiff filing bond to be approved by this Court in the sum of two hundred dollars, within thirty days from this date and bill of exceptions to be filed and approved within sixty (60) days from this date."

Defendant further alleges that the said Louisa W. Steen perfected an appeal from said judgment to the Appellate Court of the First District of Illinois which thereafter, on to-wit, the 3rd day of April, 1920, filed an opinion and entered an order and judgment affirming the judgment of the Superior Court of Cook County, Illinois; and thereafter, on to-wit, the 17th day of May, 1920, said Appellate Court allowed a certificate of importance and appeal to the Supreme Court of Illinois; that thereafter, the said Louisa W. Steen perfected said appeal in the Supreme Court of the State of Illinois, which is the highest judicial tribunal of said state; that thereafter, on to-wit, the 21st day of December, 1920, the said Supreme Court of the State of Illinois filed an opinion in the said case of Louisa W. Steen vs. Modern Woodmen of America, which said opinion is reported in Volume 296 of the Illinois Reports, page 104, (129 N. E. 546) a full and true copy of which said opinion is filed herewith and made a part hereof and marked "Exhibit 1," whereby the said Supreme Court affirmed the judgment of the Appellate Court and held that said by-law, Section 66, is a reasonable and valid by-law and not contrary to public policy, and violates no contract rights of the certificate holders, and is binding upon the members of this defendant and their beneficiaries, and is entitled to be enforced. That thereafter the said Louisa W. Steen filed a petition for rehearing in the Supreme Court of Illinois, which said petition for rehearing was overruled and denied on February 3, 1921, and and said opinion thereupon be-[fol. 34] came final; that thereupon judgment was entered in said

Supreme Court in favor of this defendant affirming the judgment of said Appellate Court.

That the constitution and by-laws of this defendant and the contract rights between this defendant and its members, and the authority and power of this defendant under its charter and the statute law of the State of Illinois, as passed upon by the Superior, Appellate and Supreme Courts of the State of Illinois in the Steen case are the same as in this case; that one of the questions involved in this case is whether said Section 66 of defendant's by-laws is a valid by-law and binding upon the members of the Society and their beneficiaries, and that this was identically the same question which was determined by the said Superior, Appellate and Supreme Courts in the Steen case referred to above. That this Honorable Court is in duty bound under provisions of Section 1, Article 4, of the Constitution of the United States to give full faith and credit to the statute law of the State of Illinois, aforementioned, and to the aforesaid judgment and decisions of the said Superior, Appellate and Supreme Courts in the Steen case, and if this Honorable Court should fail or refuse to hold that said by-law (Section 66 aforesaid) is a valid by-law and a valid and existing part of the contract between the said Walter Crocker Mixer and this defendant, and that the said Walter Crocker Mixer and the beneficiary under his said benefit certificate, herein sued on, and their rights under the said contract, herein sued on, are subject to the provisions of said by-laws, this would constitute a failure and refusal on the part of this Honorable Court to give full faith and credit to the public acts, records and judicial proceedings of the State of Illinois, and to the judgment and decision of the highest judicial tribunal of said State of Illinois, the place of this defendant's incorporation and domicile, con-truing the validity of [fol. 35] said by-law, and that would be a violation of Section 1, Article 4, of the Constitution of the United States.

That there has been on file with the proper authorities in the State of Nebraska since the 1st day of September, 1908, said By-Law No. 66, hereinbefore set out, and all other by-laws of the defendant, duly certified by the Secretary of said defendant Association, as provided by the laws of the State of Nebraska.

Wherefore, no right of action has accrued on said benefit certificate, and the defendant is not liable thereunder.

Division II

Defendant further answering, and for its second affirmative g-ound of defense to plaintiff's alleged cause of action, says that it is, and during all of the times in plaintiff's petition mentioned, has been a fraternal beneficiary society organized, incorporated and existing under and by virtue of the laws of the State of Illinois; that at all of the times in plaintiff's petition mentioned, this defendant was a fraternal beneficiary society as defined in, and duly transacting business in compliance with the provisions of an Act of the General Assembly of the State of Illinois, enacted and in force from and after the 22nd day of June, 1893, entitled

"An Act to provide for the organization and management of fraternal beneficiary societies for the purpose of furnishing life

indemnity or pecuniary benefits to beneficiaries of deceased members or accident or permanent indemnity disability to members thereof; and to control such societies of this State, and providing and fixing the punishment for violation of the provisions thereof; and to repeal all laws now existing which conflict herewith."

Section 1 of said Act is as follows:

"Section 1. Be it enacted by the People of the State of Illinois, represented in General Assembly: That a fraternal beneficiary society is hereby declared to be a corporation or association, formed or organized and carried on for the sole benefit of its members and their [fol. 36] beneficiaries, and not for profit. Each society shall have a lodge system, with ritualistic form of work and representative form of government, and shall make provision for the payment of death benefits and may, in addition thereto, provide for the payment by local lodges of benefits in case of sickness, disability or old age of its members, subject to their compliance with its constitution and laws. The fund from which the payment of such benefits shall be made, and the fund from which the expenses of such association shall be defrayed, shall be derived from assessments or dues collected from its members. Payment of death benefits shall only be made to the families, heirs, blood relations, affianced husband or affianced wife, of, or to persons dependent upon the members; and such benefits shall not be willed, assigned, or otherwise transferred to any other person. All such societies shall be governed by this act, and shall be exempt from the provision of all insurance laws of this State, and no law hereafter passed shall apply to them unless they be expressly designated therein."

Defendant further alleges that it is and was at all of the times in plaintiff's petition mentioned, a corporation formed, organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit, having a lodge system with ritualistic form of work and representative from of government, and makes provision for the payment of death benefits, subject to compliance by its members with its constitution and laws; that the fund from which the payments of such benefits is made, and the fund from which the expenses of the society are defrayed is derived from assessments and dues collected from its members. That it makes payment of death benefits to the families, heirs, blood relations of, or to persons dependent upon its members.

Defendant further alleges that it now is, and was at all of the times in plaintiff's petition mentioned, transacting business as a fraternal beneficiary society in the State of Nebraska, and that it has at all times complied in all respects with the provisions and [fol. 37] regulations contained in the laws of the State of Nebraska, and was, and is duly and regularly licensed to transact business in the State of Nebraska as a fraternal beneficiary society pursuant to said laws.

Defendant further alleges that plaintiff's alleged cause of action is founded on a contract made and entered into between Walter

Crocker Mixer, mentioned in plaintiff's petition, and this defendant, which said contract is composed of (1) the charter and articles of association of Modern Woodmen of America and the statutes of the State of Illinois in force at the time of the organization of the defendant and at all times thereafter, which are a part of said Charter of defendant, (2) the by-laws, laws, rules and usages of Modern Woodmen of America in force at the time the said Walter Crocker Mixer became a member of the defendant, together with all by-laws, laws, rules and usages thereafter enacted by this defendant, (3) the application of said Walter Crocker Mixer for membership in this defendant, and (4) the benefit certificate issued by this defendant to the said Walter Crocker Mixer, and herein sued on.

Defendant further alleges that on the 4th day of November, 1901, the said Walter Crocker Mixer made application for membership in the defendant through Forest Camp 1957, a subordinate lodge of this defendant, located at Elk Point, South Dakota, and then and there filed written application for membership and for a Benefit Certificate in the sum of $2,000, wherein he agreed to conform in all respects to the laws, rules and usages of the Society then in force or thereafter adopted, and that if he should fail to comply with and conform to any and all of the laws of the Society, then in force or thereafter adopted, his benefit certificate should be void.

Defendant further alleges that the said application was the basis of and consideration for a certain benefit certificate, No. 842861, [fol. 38] issued by this defendant to the said Walter Crocker Mixer on the 18th day of November, 1901, a copy of which said benefit certificate is attached to plaintiff's petition and marked "Exhibit A" and is herein sued on, and the same is hereby referred to and made a part of defendant's answer the same as if herein incorporated and repeated; that the said benefit certificate has and contains, among other things, the following provisions, to-wit:

"This Benefit certificate is issued and accepted only — the following express warranties, conditions and agreements:

7. No action can or shall be maintained on this certificate, unless brought within one year from the date of the death of said Neighbor."

Defendant further alleges that its by-laws in full force and effect from and after the first day of September, 1911, have provided that no action for recovery on a death based upon any benefit certificate, heretofore or hereafter issued by the society, can or shall be maintained unless brought within eighteen months from the date of death of the member.

Defendant further alleges that this action was not brought within eighteen months from seven (7) years subsequent to the Fall of 1910, wherefore said action cannot be maintained.

Wherefore, defendant having fully answered, prays that plaintiff's petition be dismissed and that it have a judgment for its costs herein.

Truman Plantz, Nelson C. Pratt, Attorneys for Defendant.

[fol. 39] Jurat showing the foregoing was duly sworn to by Nelson C. Pratt omitted in printing.

Exhibit 1 to Answer

Thompson, J.:

Appellant filed her declaration in the superior court of Cook County against appellee, alleging that appellee is a corporation organized under the laws of this state for the purpose of providing death benefits to the beneficiaries of its members upon payment of certain assessments and compliance with certain requirements and conditions; that in 1897 appellee issued its benefit certificate to Albert F. Steen, which certificate named appellant as beneficiary; that on the 7th day of May, 1910, Albert F. Steen disappeared from his home in the City of Chicago and has been unaccountably absent ever since; that he left with the intention of returning the same day, but has never returned; that diligent and continuous search and inquiry have been made for him by appellant, but she has been and is wholly unable to find or locate him; that on the 7th day of May, 1917, the absence of Albert F. Steen had continued 7 years, and that Albert F. Steen was presumed by law to be dead; that Albert F. Steen died May 7, 1917; that appellant is the widow and beneficiary of deceased; that appellant notified appellee shortly after such disappearance and has since fully informed appellee concerning the [fol. 40] same; that October 15, 1917, appellant gave appellee notice in writing of the disappearance and absence and requested payment of benefits under the certificate; that all required dues and assessments have been fully paid on behalf of assured up to and including May, 1917; that at the time of Albert F. Steen's death he was a member in good standing in appellee.

To the declaration appellee filed a plea of general issue and a special plea. The special plea averred the issuance of a certificate to assured; that appellee is a fraternal beneficiary society; that it makes provisions for payment of death benefits in case of the death of members in good standing; that the contract in question consists of the application, the by-laws, and the benefit certificate; that at the time the assured made his written application for membership he contracted "to conform in all respects to the laws, rules and usages of the order now in force or which may hereafter be enacted and adopted by same, and that this application and the laws of this order shall form the sole basis of my admission to membership therein and of the benefit certificate to be issued me by said Modern Woodmen of America;" that in said application he was asked the following question and made the following answer:

7. Do you further understand that the laws of this order now in force or hereafter enacted enter into and become a part of every contract of indemnity by and between the members and the order and govern all rights thereunder? Answer. Yes."—that the by-laws inforce when the benefit certificate was issued were subsequently amended and modified, and from and after September 1, 1908, to the present time said by-laws have provided, among other things, in substance as follows:

"Sec. 64. Action on Certificates Must Be Brought Within Eighteen Months.—No action for recovery on a death claim based upon any benefit certificate heretofore or hereafter issued by this society can or shall be maintained until after the proofs of death and claimant's rights to benefits, as provided in these by-laws, shall have been filed with the Head Clerk and passed upon by the Board of [fol. 41] Directors, nor unless brought within eighteen months from the date of the death of the member.

"Sec. 66. Disappearance No Presumption of Death.—No lapse of time or absence or disappearance on the part of any member heretofore or hereafter admitted into the society, without proof of the actual death of such member while in good standing in the society, shall entitle his beneficiary to recover the amount of his benefit certificate, except as hereinafter provided. The disappearance or long continued absence of any member unheard of shall not be regarded as evidence of death or give any right to recover on any benefit certificate heretofore or hereafter issued by the society until the full term of the member's expectancy of life according to the National Fraternal Congress Table of Mortality has expired within the life of the benefit certificate in question, and this law shall be in full force and effect, any statute of any state or country or rule of common law of any state or country to the contrary notwithstanding. The term 'within the life of the benefit certificate,' as here used, means that the benefit certificate has not lapsed or been forfeited and that all payments required by the by-laws of the society have been made."

The special plea of appellee further averred that proof of the actual death of Albert F. Steen has never been furnished to appellee, and that the expectancy of life of Albert F. Steen according to the National Fraternal Congress Table of Mortality has not expired. To this special plea appellant filed a general demurrer, which was overruled. She elected to stand by her demurrer, and the superior court entered judgment in favor of appellee, which judgment was on appeal affirmed by the Appellate Court for the First District. That Court granted a certificate of importance, and this further appeal has been prosecuted.

The only question presented by this appeal is the validity of [fol 42] Section 66 of appellee's by-laws. Appellant contends that this by-law is void because its meaning is uncertain, it is unreasonable, and it is against the public policy and established law of the state. An able and exhaustive brief has been filed by learned counsel for appellant urging their views on these points, and we give attention to the points in the order stated.

(1) Counsel argue, first, that this by-law is uncertain, unintelligible, and so incomplete as to make it incapable of enforcement without a further provision in the by-law, contending that the by-law fixes no date or age of the assured at which his expectancy of life shall begin to run. Unless it can be determined from the by-law at what age the member's life expectancy is to be calculated,

it must be declared void, for the length or duration of such expectancy must be determined by the age of the member at the time fixed by the by-law to begin, for it is a matter of common knowledge that the expectancy of life of a person varies with every succeeding year of life. It is important that the beneficiary shall in some way be able to tell how many years she will be required to pay dues after the disappearance of the member, so that she may determine the wisdom of keeping the certificate alive or of letting it lapse. We think it clear from a consideration of the by-laws and the apparent purpose for which it was passed that the age fixed at which the expectancy of life is to begin to run is the time of disappearance. The object of the by-law is to establish a rule of evidence in disappearance cases different from the 7 years' absence rule established by the common law. The rule of evidence sought to be established is that, when a member disappears and nothing is heard from him, he is presumed to live out his natural expectancy, and at the end of his natural expectancy he will be presumed to be dead, but not until that time has arrived. This natural expectancy is to be determined according to the National Fraternal Congress Table of Mortality, a table recognized by the insurance departments and the courts of practically every state in the Union. The by-law has but [fol. 43] one purpose and refers to but one time. The time to which it refers is the date of disappearance of the member, and under the by-law the member's expectancy of life must be determined from the age of the member on the date of his disappearance.

(2, 3) It is further contended that the word "actual," used in connection with the word "death," adds nothing to the meaning of the latter word, and reliance is placed upon the language in Gaffney v. Royal Neighbors, 31 Idaho, 549, 174 Pac. 1014, where the court, in passing on a by-law identical with the one under consideration, said:

"We are at a loss to determine what added force is given to the language by use of the word 'actual' in connection with the word 'death'. Every death is an actual death, and there is no such thing as constructive or presumptive death."

Much of the argument is based upon the theory that this by-law excluded proof of death by circumstantial evidence. We do not think the by-law subject to this construction. The law is well settled in this state that death may be proven by circumstanctial evidence, and we do not consider that the by-law attacks in any way that established principle. We think, however, there is a clear distin-tion between the actual death and death presumed by 7 years' continued and unexplained absence. The word "actual" has a well-understood meaning. It is something real or actually existing as opposed to something merely possible. Actual death is death existing in fact as distinguished from a contructive or speculative death established by a rule of evidence brought into being by necessity. If a man is actually dead—that is, dead in fact—he has reached a permanent state so far as worldly affairs are concerned, and

his business can be settled accordingly. On the other hand, if his death determined under the 7 years' absence rule, he is dead only because the law establishes death for certain purposes. He may, in fact, be alive. Our statute on administration of estates recognizes [fol. 44] the distinction between actual death and presumptive death, and provides that before distribution of the estate of one presumed to be dead each distributee shall give bond conditioned to refund to such *persumed* decedent, if alive, all property received by such distributee. Hurd's Stat. 1917, p. 23. This by-law provided that appellee will not pay the amount provided in the benefit certificate until there is filed, in accordance with its laws, proof of death in fact, or proof that the member has lived out his full expectancy of life, calculated from the time the member was last known to be alive. Its provisions are clear and the by-law is not void for uncertainty.

(4-7) It is earnestly insisted by appellant that section 66 alters the contract of insurance, and is therefore unreasonable. The contract in this case is the application of the member, the constitution and by-laws of the society, and the benefit certificate issued by the society to the member, and all are to be construed together. Fullenwider v. Supreme Council of Royal League, 180 Ill. 621, 54 N. E. 485, 72 Am. St. Rep. 239. A person who enters an association must acquaint himself with its laws for they contribute to the admeasurement of his rights, his duties and his liabilities. Where, as here, there is an express and clear reservation of the right to amend, he is bound to take notice of the existence and effect of that reserved power. The power to enact by-laws is inherent in every corporation as an incident of its existence. This power is a continuous one, and *on* one has a right to presume that by-laws will remain unchanged. Where the contract contains an express provision reserving the right to amend or change by-laws, it cannot be doubted that the society has the right so to do, and where in the contract of insurance it is provided that members shall be bound by the rules and regulations now governing the society or that may thereafter be enacted for such government and those conditions are assented to, and the member accepts the benefit certificate under the [fol. 45] conditions provided therein, it is a sufficient reservation of the right in the society to amend or change its by-laws. Murphy v. Nowak, 223 Ill. 301, 79 N. E. 112, 7 L. R. A. (NS) 393; Supreme Council of Royal Arcanum v. McKnight, 238 Ill. 349, 87 N. E. 299; Pold v. North American Union, 261 Ill. 433, 104 N. E. 4; Apitz v. Supreme Lodge, Knights & Ladies of Honor, 274 Ill. 196, 113 N. E. 63, L. R. A. 1917A, 183; Supreme Lodge, Knights of Pythias v. Mims, 241 U. S. 574, 36 Sup. Ct. 702, 60 L. Ed. 1179, L. R. A. 1916F, 919.

(8) The duly chosen and authorized representatives of the members alone are vested with the power of determining when a change is demanded, and with their discretion, generally speaking, courts cannot interfere. Were it otherwise, courts would control all benevolent associations, all corporations, and all fraternities. It is only

when there is an abuse of discretion and a clear, unreasonable, and arbitrary invasion of private rights that courts will assume jurisdiction over such societies or corporations. With questions of policy, doctrine, or discipline courts will not interfere. Supreme Lodge, Knights of Pythias v. Knight, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409.

(9) At the time this benefit certificate was issued there was a well-established rule of evidence in this state that the unexplained absence of a person from home without having been heard from for 7 years by those who would naturally have heard from him if he had been alive, although diligent efforts were made to find him, raised a presumption of death, unless the circumstances of the case were such as to account for his not being heard of without assuming his death. Whiting v. Nicholl, 46 Ill. 230, 92 Am. Dec. 248; Donavan v. Major, 253 Ill. 179, 97 N. E. 231. This is an arbitrary presumption, rendered necessary on grounds of public policy, in order that rights depending upon life or death of persons long absent and unheard of may be settled by some certain rule. Jones, in volume 1 of his Commentaries on Evidence, #61, says:

[fol. 46] "Thayer, in his usual thorough way, gives an interesting and instructive account of the presumption, and fixes its application in its present form as of 1805, and that it appeared for the first time in the text-books in *1915*, and was speedily followed by other eminent writers, ending in 1876 with Stephen. 'Here, then,' says Thayer, 'in 70 years we find the rule about a 7 years' absence (1) coming into existence in the form of a judicial declaration about what may or may not fairly be inferred by a jury in the exercise of their logical faculty, the particular period being fixed by reference to two legislative determinations in specific cases of a like question; (2) passing into the form of an affirmative rule of law requiring that death be assumed under the given circumstances. This is a process of judicial legislation, advancing what is a mere recognition of a legitimate step in legal reasoning to a declaration of the legal effect of certain facts.'"

(10) This legal presumption of death from 7 years' unexplained absence arose by analogy under two early English Statutes, the one exempting from the penalty of bigamy any person whose husband or wife should be continuously beyond the seas or should absent himself or herself for the space of 7 years together, and the other providing that persons in leases for lives who shall remain beyond the seas or absent themselves from the realm for more than 7 years shall, in the absence of proof to the contrary, be deemed naturally dead. That the rule in question is merely a rule of evidence is unquestioned, Stevenson v. Montgomery, 263 Ill. 93, 104 N. E. 1075, Ann. Cas. 1915C. 112. It *it* so treated by all the text book writers. It was a rule born of necessity, to prevent the prosecution for bigamy of a deserted spouse, on the one hand, and to settle the property affairs of the absentee on the other hand. It grew up in England at a time when travel was fraught with every danger

known to man and when means of communication were primitive. Since this rule of law was established the social aspects of our civil- [fol. 47] ization have been almost revolutionized. The improbability that accident, injury, sickness, or death could overtake a member of this society without information of the fact reaching his family and friends is very great. In case of need he scarcely could fail to find assistance among the million members of his own fraternity. Hospital, police, burial, and other records are collected and preserved in practically every state in this country and newspapers are published in every city and village, and, except for the reasons for which the law was originally established, there is now no sound reason for continuing the rule except that it has existed for so long a time that convenience makes it the best rule to follow where no other rule is established by statute or by agreement.

(11, 12) The contract in question here is insurance on life, and the one essential fact necessary to mature this contract is the death of the insured. The burden is on the beneficiary to prove this death. The rule of law which appellant invokes is a rule of evidence and relates to the manner and quantum of proof necessary to establish death. By the common law rule a finding of the death of the insured will be sustained on proof of seven years' continued absence without intelligence of such absent person. Under the by-law in question such proof is not sufficient unless the absence has continued for a period equal to the member's expectancy of life. There is no vested right in a rule of evidence, and parties may by contract change an established rule of evidence and provide that a different rule shall apply in determining controversies that may arise between the parties to the contract. Roeh v. Business Men's Protective Ass'n., 164 Iowa, 199, 145 N. W. 479, 51 L. R. A. (NS) 221, Ann. Cas. 1915C, 813; Lundberg v. Interstate Business Men's Accident Ass'n. 162 Wis. 474, 156 N. W. 482, Ann. Cas. 1916D, 667, Cobble v. Royal Neighbors, (No. App.) 219 S. W. 118. In Chicago, Burlington & Quincy Railroad Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278, we said:

[fol. 48] "No man or corporation has a vested right in the rules of evidence. They pertain to the remedies provided by the state for its citizens, and do not constitute a part of any contract."

To the same effect is our holding in People v. Rose, 207 Ill. 352, 69 N. E. 762, and in Chicago Transfer Railroad Co. v. City of Chicago, 217 Ill. 343, 75 N. E. 499.

The average duration of human life after any given age being now ascertained and stated in well-authenticated tables, which have been recognized by the courts as safe rules in the calculation of the value of annuities and in other similar cases, no good reason is perceived why the same tables may not be accepted as furnishing ground legally to presume the death of a person after the lapse of the period of probable duration of his life, in the absence of any evidence to the contrary. These tables are scientifically made from actual experience in dealing with a given number of human lives at a given age. As we have said, the presumption of death on ac-

count of 7 years unexplained absence is an arbitrary rule, established by necessity, and has no basis in fact or in experience. The purpose of the by-law under consideration is not to do away with presumption of death on account of disappearance and continued absence, but is to substitute certainty for uncertainty, to displace guess work by science, and to supplant groundless conjecture by actual experience. The record shows that Albert F. Steen was born in 1870 and joined the society in 1897. He was then 27 years of age, and according to the National Fraternal Congress Table of Mortality, his expectation of life was then 40.2 years. He disappeared in 1910 and was then 40 years of age. According to the same table his expectation of life was then 29.9 years. This by-law, it will be seen, does not oust the courts of jurisdiction nor destroy the cause of action. In the instant case it merely delays the cause. Suppose, however, the member has been 74 years of age when he disappeared. Then, according to the table adopted by the by-law, his expectancy of life would have been seven years, and under those circumstances the rule fixed by the by-law and the common-[fol. 49] law rule of evidence would have established death at exactly the same time; but, if the member had been 79 years of age at the time of his disappearance, his natural expectancy of life would have been five years, or, if he had been 85 years of age at the time of his disappearance, his expectancy would have been 3 years, and if he had been 96 years of age, his expectancy would have been one year. Under these circumstances it will be noted that the by-law provides a rule of evidence much more favorable to the beneficiary than the common-law rule. The rule of evidence established by this by-law is for the mutual benefit of all the million members of this society. The insured had the benefit of this agreement as well as all other members, and his beneficiary must share its burdens. Parties have a right to agree as to what proof of death shall be furnished before the policy is payable. Appellee, as a legal entity, has no interest in this matter apart from its membership because it is a society organized not for profit. The unjust losses that might be paid under the common-law 7 years' absence rule would fall on the members of the society. Appellee merely distributes the funds which are collected from the members. Where the common-law rule is invoked for the purpose of settling the title to property by administration or succession, there is no incentive for the absentee to purposely absent himself and conceal his whereabouts, but rather the reverse. A by-law similar to the one challenged has been sustained in Cobble v. Royal Neighbors, supra; in McGovern v. Brotherhood of Locomotive Firemen & Engineers, 31 Ohio, Cir. Ct. 243, affirmed by the Supreme Court without an opinion, 85 Ohio, St. 480, 98 N. E. 1128; in Kelly v. Catholic Mutual Benefit Assn., 46 App. Div. 79, 61 N. Y. Supp. 394; and in Porter v. Home Friendly Society, 114 Ga. 937, 41 S. E. 45.

A disappearance by-law much more drastic in its terms was held valid by this court in Apitz v. Supreme Lodge, Knight & Ladies of Honor, supra. The by-law there sustained provided that if a relief

[fol. 50] fund member disappeared from his home and nothing was heard from him by his family or the secretary of his lodge and no information could be had concerning him after diligent inquiry, and such disappearance continued for the period of one year, said member stood suspended as in case of suspension for non-payment of assessments. Under a by-law like the one in the Apitz case the beneficiary would have no right to continue payment of the assessments in order to keep the certificate alive, and if the member should reappear any time after the close of the first year's absence and should be unable to comply with the requirements of the society for reinstat-ment of members suspended for nonpayment of assessments, then all rights under the contract would be lost. Under such a by-law, if a member between the ages of 75 and 96 disappeared and no intelligence of him was received for 7 years, the beneficiary would not only lose the right to establish her case under the common-law 7 years absence rule, but would have no rights under the by-law. Under the by-law now being considered, if such a member disappeared the beneficiary could establish her case by proof of absence covering the member's expectancy of life, which would in all instances be less than 7 years. In that case we held that the beneficiary has no vested interest in a benefit certificate, and where the contract between the member and the society reserves the right to the society to amend or change the by-laws, and the member agrees to be bound thereby and accepts the certificate under these conditions, subsequently enacted by-laws are binding upon him. A by-law similar to the one held valid in the Apitz case was sustained by the Supreme Court of Maryland in Royal Arcanum v. Vitzthum, 128 Md. 523, 97 Atl. 923, L. R. A. 1917A, 179. That by-law was even more drastic in that it forfeited the certificate after 6 months' absence and failure to report.

(13) We think any provision of a contract which tends to prevent unjust and fraudulent claims should be upheld. No insurance [fol. 51] society could exist on reasonable rates if the face of the straight life policy were due to become due at the end of 7 years. As applied to life insurance, the common-law 7 years absence rule is without reason and is based neither on fact nor experience. While the common-law rule will be enforced where the parties have not contracted otherwise, we think it not only reasonable, but entirely sound from a business standpoint, that the parties should contract to establish death in disappearance cases in accordance with tables scientifically made from experience. This by-law does nothing more than change a rule of evidence, and in that respect it is equally as reasonable as the by-laws approved in Roeh v. Business Men's Protective Ass'n supra, and Lundberg v. Interstate Business Men's Accident Assn supra. It is equally as reasonable as by-laws passed subsequently to issuing the benefit certificate and forfeiting the benefit when the insured changes his employment by certain prohibited occupations or commits suicide, and such by-laws have been sustained.

It is further urged that the by-law is void because it is against the public policy and established law of the state. In Zeigler v.

Illinois Trust & Savings Bank, 245 Ill. 180, 91 N. E. 1041, 28 L. R. A. (N. S.) 1112, 19 Ann. Cas. 127, we said:

"There is no precise definition of public policy, and consequently no absolute rule by which a contract can be measured or tested to determine whether or not it is contrary to public policy. Each case, as it arises, must be judged and determined according to its own peculiar circumstances. The public policy of the state or of the nation is to be found in its constitution and in its statutes, and when cases arise concerning matters upon which they are silent then in its judicial decisions and the constant practice of the government officials."

"It is clearly to the interest of the public that persons should not be unnecessarily restricted in their freedom to make their own contracts, and therefore agreements are not to be held void as being contrary to public policy unless they are clearly contrary to [fol. 52] what the legislature or judicial decision has declared to be the public policy or they manifestly tend to injure the public in some way," 13 Corpus Juris 437.

(14) We think the authorities generally agree that a contract is not void as against public policy unless it is injurious in some way to the interestes of society. Surely a contract which tends to prevent the payment of fraudulent or fictitious claims is not injurious to society. The member, Albert F. Steen, had the benefit of this by-law in that it protected the Benefit fund from being weakened by the payment of fraudulent or fictitious claims, and his beneficiary must assume the burdens of the same contract under which she is indirectly benefited. The courts must act with care in extending those rules which say that a given contract is void because against public policy, since, if there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into fairly and voluntarily, shall be held sacred and shall be enforced by the courts.

(15) Because a contract may waive constitutional or statutory rights or may change an established rule of law does not necessarily render it void on the ground that it is against public policy. In Peoria Marine & Fire Ins. Co. v. Whitehill, 25 Ill. 382 (original edition, p. 466), this court held that an insurance company had the right in its policies to limit the time in which an action should be brought for a loss, and that the by-law was not against public policy simply because it fixed a period less than that fixed by the statute of limitations. In Pacaud v. Waite, 218 Ill. 138, we held that parties may make valid and binding agreements to submit questions in dispute to the arbitrament of persons or tribunals other than the legally organized courts, and in Deibeikus v. Link Belt Co., 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241, this court laid down the rule that a contract waiving the constitutional right of a trial [fol. 53] by jury was not against public policy.

(16) Much that we have said regarding the reasonableness of this by-law applies with equal force to the objection now being consid-

ered. The purpose of this by-law is to protect the members and their beneficiaries by protecting the benefit fund against doubtful and unjust claims. The time when a disappeared member will be presumed to be dead is based upon the actual experience of human life as shown by a standard table of mortality. We do not see how it can reasonably be said that a rule of evidence based upon human experience, rather than upon necessity and convenience, is contrary to public policy.

The Supreme Courts of other states passing upon this by-law, or others identical with it, have come to a conclusion directly opposed to the one we have reached. Haines v. Modern Woodmen (Iowa) 178 N. W. 1010; Garrison v. Modern Woodmen (Neb.) 178 N. W. 842; Sweet v. Modern Woodmen, 169 Wis. 462, 172 N. W. 143; Gaffney v. Royal Neighbors, 31 Idaho, 549, 174 Pac. 1014; Hannon v. United Workmen, 99 Kan. 734, 163 Pac 169, L. R. A. 1917C, 1029. These are well considered opinions, but we think the conclusion reached in them violated sound and well-settled principles of law, and we cannot adopt the views expressed by these able and distinguished courts.

For the reasons hereinbefore stated, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

[File endorsement omitted]

DISTRICT COURT OF DAKOTA COUNTY, NEBRASKA

[Title omitted]

DEMURRER—Filed November 7, 1921

[fol. 54] Comes now the defendant in the above entitled cause and demurs to the petition of plaintiff for the reason that said petition does not state facts sufficient to constitute a cause of action.

Modern Woodmen of America, by Nelson C. Pratt, Its Attorney.

[File endorsement omitted]

IN THE DISTRICT COURT OF DAKOTA COUNTY, NEBRASKA

[Title omitted]

JOURNAL ENTRY

Now on this 21st day of November, A. D. 1921, it being a day of the regular September term of this court this cause came on for hearing and on agreement of parties a Jury is waived.

——— ———, Judge.

[File endorsement omitted]

IN THE DISTRICT COURT OF DAKOTA COUNTY, NEBRASKA

[Title omitted]

ORDER WAIVING JURY

[fol. 55] Now to wit, on this 21st day of November, 1921, it being a regular day of this Court, both the plaintiff and attorney came into Court and waived the right to try said case before a jury.

It is therefore ordered that this case be tried before the Court without a jury.

Guy T. Graves, Judge of the District Court within and for Dakota County, Nebraska.

[File endorsement omitted]

IN THE DISTRICT COURT OF DAKOTA COUNTY, NEBRASKA

[Title omitted]

REPLY—Filed January 10, 1922

Comes now the plaintiff and for reply to the answer filed by the defendant herein, denies each and every allegation of new matter set out in said answer.

The plaintiff demurs to Division One (1) of defendant's answer for the following reason:

1. That Division One (1) of said answer does not state facts sufficient to constitute a defense.

The plaintiff demurs to Division Two (2) of said answer filed herein for the following reason:

2. That Division *One (1)* of said answer does not state facts sufficient to constitute a defense.

Wherefore plaintiff prays that the answer of the defendant may be dismissed and she recover the amount as set out in the prayer of her petition.

Geo. W. Leamer, Attorney for Plaintiff.

[fol. 56] Jurat showing the foregoing was duly sworn to by Jennie Vida Mixer omitted in printing.

IN THE DISTRICT COURT OF DAKOTA COUNTY, NEBRASKA

[Title omitted]

DECREE

Now to-wit, on this 10th day of January 1922, it being a regular day of this Court this cause came on to be heard upon the petition, the answer and reply filed herein, the plaintiff appearing in person and by her attorney, Geo. W. Leamer and the defendant appearing by its attorney, Nelson C. Pratt. The demurrer to Division 1 of the defendant's answer being the first affirmative ground of defense and Division 2 of defendant's answer being the second ground of affirmative defense came on to be heard and the Court being duly advised in the premises finds that the demurrer to the first affirmative defense of defendant, being Division 1 of its answer and also the demurrer to the second affirmative defense, being Division 2 of defendant's [fol. 57] answer, should be sustained. The court finds that divisions 1 and 2 of the answer presents no Federal question.

It is therefore ordered, adjudged and decreed by this Court that said demurrer to the first affirmative defense of defendant, designated as Division 1 in its answer, and the second affirmative defense of defendant, designated as Division 2 of its answer, is sustained and the defendant having elected to stand on its answer and declining to plead further.

It is further ordered, adjudged and decreed that Division 1 and Division 2 of the answer of said defendant be dismissed.

Now at this time the plaintiff introduced her evidence and rested. The defendant introduced no evidence. The Court being duly advised in the premises finds that all the allegations of the petition of plaintiff to be true; that said Walter Cro-ker Mixer has been absent from his home and place of residence for over seven (7) years, last past; and said absence has been continued and unexplained and that by reason of said fact said Walter Cro-ker Mixer is presumed to be dead and is hereby declared to be dead. That judgment should be entered as prayed for in said petition and that there is due the plaintiff from the defendant the sum of $2,046.65.

It is therefore ordered, adjudged and decreed by this Court that the plaintiff recover of and from the defendant the sum of $2,046.65 and the costs of this action, taxed at $—. To all of which rulings of the Court the defendant excepts.

Guy T. Graves, Judge of the District Court within and for Dakota County, Nebraska.

[File endorsement omitted]

IN THE DISTRICT COURT OF DAKOTA COUNTY, NEBRASKA

[Title omitted]

MOTION FOR NEW TRIAL—Filed January 10, 1922

[fol. 58] Comes now the defendant and moves the Court to set aside the judgment in the above-entitled cause and for a new trial, for the following reasons:

1. The verdict is not sustained by sufficient evidence.

2. The verdict is contraty to law.

3. Errors of law occurring at the trial duly excepted to.

4. The Court erred in sustaining the demurrer of plaintiff to defendant's first affirmative ground of defense.

5. The Court erred in sustaining plaintiff's demurrer to defendant's second affirmative ground of defense.

6. The Court erred in finding for the plaintiff and against the defendant.

7. The Court erred in rendering judgment for the plaintiff.

8. The Court erred in holding that it was not controlled by the laws of the State of Illinois.

9. The Court erred in holding that the full faith and credit clause of the Constitution was not violated by not following the laws and the decisions of the State of Illinois.

Nelson C. Pratt, Attorney for Defendant, Modern Woodmen of America.

DISTRICT COURT OF DAKOTA COUNTY, NEBRASKA

[Title omitted]

ORDER REFUSING NEW TRIAL

[fol. 59] Now to-wit, on this 10th day of January, 1922, it being a regular day of this Court the motion for a new trial in this cause came on to be heard and the Court being duly advised in the premises finds that said motion for a new trial should be overruled.

It is therefore ordered, adjudged and decreed that the motion for a new trial in this cause be and is overruled; and to all of which rulings of the Court the defendant excepts and is given 40 days from the rising of this Court to prepare and serve the bill of exceptions.

Guy T. Graves, Judge of the District Court.

SUPERSEDEAS BOND ON APPEAL FOR $4,118.90—Approved and filed January 24, 1922; omitted in printing

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[fol. 60] STATE OF NEBRASKA,
County of Dakota, ss:

CLERK'S CERTIFICATE

I, George J. Boucher, Clerk of the District Court in and for Dakota County, Nebraska, do hereby certify that the foregoing is a full and true transcript of the proceedings and record had in the cause in the District Court, containing the Petition, Answer, Reply, Demurrers, Ruling on Demurrers, Judgment, Motion for a New Trial, Order Overruling the Motion for a New Trial, and Supersedeas Bond, of Jennie Vida Mixer vs. Modern Woodmen of America, appearing of record in said Court.

I do further certify that the Bill of Exceptions hereto attached and [fols. 61 & 62] made a part of this transcript was attached by me, and is the original Bill of Exceptions filed in the office of the Clerk of said Court in the above entitled action.

In witness whereof I have hereunto set my hand and affixed the seal of said Court, at Dakota City, this 14th day of February, A. D., 1922.

Geo. J. Boucher, Clerk of the District Court. (Seal.)

[File endorsement omitted.]

[fol. 63] IN THE DISTRICT COURT OF DAKOTA COUNTY, NEBRASKA

[Title omitted]

Bill of Exceptions Before the Honorable Guy T. Graves, Judge—Filed February 7, 1922

[fol. 64] STATE OF NEBRASKA,
Dakota County, ss:

I, George J. Boucher, Clerk of the District Court of the Eighth Judicial District of the State of Nebraska in and for said County, do hereby certify that this is the original Bill of Exceptions filed in my office, in the cause in said Court wherein Jennie Vida Mixer was plaintiff and the Modern Woodmen of America was defendant.

Witness my signature and official seal this 14th day of February, A. D., 1922.

Geo. J. Boucher, Clerk of the District Court. (Seal.)

[fols. 65 & 66] STIPULATION AND ORDER SETTLING BILL OF EXCEPTIONS

It is hereby stipulated and agreed by and between the parties hereto, that the following transcript is a true and complete copy of all the evidence, oral or documentary, introduced on the trial of the within entitled cause by either party, together with all the objections of counsel thereto, the rulings of the court on said objections, and exceptions taken thereto.

Dated Feb. 7, 1922.

Geo. W. Leamer, Attorney for Plaintiff. Nelson C. Pratt, Attorney for Defendant.

I hereby certify that the within record now contains all the evidence offered or given upon the trial of the within cause by either party, together with all objections thereto, rulings thereon, and exceptions to such rulings, and on application of Modern Woodmen of America, the defendant, this bill of exceptions is hereby allowed, by me, and ordered to be made a part of the record in this case.

Dated Feb. 7, 1922.

Guy T. Graves, District Judge.

[fols. 67 & 68] PLAINTIFF'S EXHIBIT 1, PHOTOSTATIC COPY OF BENEFIT CERTIFICATE ISSUED TO W. C. MIXER—Omitted in printing.

[fol. 69] OFFERS IN EVIDENCE

Mr. Leamer: The plaintiff now offers in evidence Plaintiff's Exhibit 1.

Mr. Pratt: The defendant objects to the offer made for the reason that it is incompetent, irrelevant and immaterial. It does not ground that upon the fact that it has not been identified.

Overruled, to which defendant excepts.

Plaintiff's Exhibit 1 was thereupon received in evidence and the original thereof follows, attached to Page 3 of this bill of exceptions.

Mr. Leamer: Plaintiff offers in evidence Exhibit 2, in two parts.

Mr. Pratt: The defendant admits that it received this paper, Exhibit 2, with accompanying letter, from counsel for plaintiff on the date stated on the face of the paper which was March 14, 1921.

The defendant objects to the paper for the purpose of supplying the death proofs in this case; incompetent, irrelevant and immaterial.

Overruled, to which defendant excepts.

Plaintiff's Exhibit 2 was thereupon received in evidence, and the original thereof follows, constituting pages 5, 6, 7 and 8 of this bill of exceptions.

[fol. 70] PLAINTIFF'S EXHIBIT 2

STATE OF NEBRASKA,
County of Dakota, ss:

Mor. Mar. 14, 1921.

I, Jennie Vida Mixer of lawful age, being first duly sworn deposes and says that she was the wife of Walter Crocker Mixer, and the beneficiary under benefit certificate number 842,861 of the Modern Woodmen of America, a Fraternal Beneficiary Society; that the said Walter Crocker Mixer was a member of the Forrest Camp, number 1957 of the Modern Woodmen of America at Elk Point, Union County, South Dakota, and said benefit certificate was dated November 18, 1901, and was for the amount of $2,000.00.

Affiant further states that the said Walter Crocker Mixer disappeared in the month of December, 1910, and last heard from by his wife or any person was in the month of February, 1911, when he wrote that he was in a hospital at Midland, South Dakota; that said affiant and her family have made inquiries and have never heard where the said Walter Crocker Mixer is or where he went to from there since February, 1911.

Affiant further states that she has paid all assessments and dues under and by virtue of such benefit certificate, and that the said Walter Crocker Mixer has been absent from his home continuously, and his whereabouts have not been known since the month of February, 1911.

Affiant, Jennie Vida Mixer, who is the beneficiary under said benefit certificate respectfully claims the $2,000.00 dues under said certificate and asks that the same be paid to her; that she has said benefit certificate in her possession and is ready to surrender the same upon said payment.

Jennie Vida Mixer.

Pl't'f's Exhibit No. 2. Jennie Vida Mixer vs. Modern Woodmen. Robert G. Fuhrman, Reporter.

[fol. 71] Subscribed in my presence and sworn to before me this 8 day of March, 1921. Geo. W. Leamer, Notary Public. My Commission expires June 12, 1922. (Seal.)

Geo. W. Leamer, Lawyer, Dakota City, Neb.; County Attorney, Dakota City, Neb.

Registered package.
March 11, 1921.
Mor. Mar. 14, 1921.

Mar. 14, 1921.

Modern Woodmen of America, Rock Island, Ill.

GENTLEMEN: Please find enclosed affidavit in regard to the disappearance and death of Walter Crocker Mixer, who holds a benefit certificate under you- soci-ty.

The Beneficiary, *Jennie Vida Mixer*, has been to my office and she is now making a claim for this amount of money under the law in our State that seven years' absence of a person raises the presumption of death.

We have had sent to us blanks of proof of death, but under the circumstances it is impossible for us to fill out and sign those proofs. We have set out in this affidavit the necessary facts showing his absence and we respectfully ask that you submit this to the proper authorities and allow the same.

Please let me hear from you at your earliest convenience.

Very truly yours, Geo. W. Leamer.

GWL/OL. Enc. #1.

[fol. 72] Mr. Leamer: We offer in evidence Exhibit 3 as the evidence of F. L. McClure if he was present here in court to testify.

There being no objection, Exhibit 3 was thereupon received in evidence, and the original thereof is attached to this bill of exceptions, immediately following this page, and constitutes Page 10 of this bill of exceptions.

The defendant thru its counsel, thereupon in open court made the following admission:

It is admitted that the statement of F. L. McClure, Plaintiff's Exhibit 3, was made on July 31, 1919.

The following stipulation was thereupon entered into, in open court, by the parties, thru their respective counsel:

It is stipulated between the parties to this action that the person referred to as W. C. Mixer by F. L. McClure in Plaintiff's Exhibit 3, is the same person as Walter Crocker Mixer, referred to in Plaintiff's Exhibit 1.

PLAINTIFF'S EXHIBIT 3

7/31-19.

Re W. C. MIXER

Statement of F. L. McClure

I, F. L. McClure, state that I was acquainted with W. E. Mixer and knew him 3 years before he disappeared, as he was employed by F. L. McClure & Company, wholesale Grocers at Sioux City, Iowa, I being the F. C. McClure of this firm.

W. C. Mixer was short in his accounts with me twice, and disappeared each time.

The first time he was short was for about $1,100 in collections. He left $300 with his wife or sister and they turned it in to *t*me. I had his wife have him come back and take up his old work—she was in touch with him, and he said he had lost the money out of his pocket. The last time he disappeared he made collections for about $900. Left our team and buggy in a livery stable and has never been heard of by us.

F. L. McClure.

[fol. 73] JENNIE VIDA MIXER, the plaintiff, being called as a witness in her own behalf, and regularly sworn, testified as follows:

Direct examination by Mr. Leamer:

1 Q. What is your name?
A. Jennie Vida Mixer.
2 Q. You are the plaintiff in this action?
A. I am.
3 Q. And you were married to Walter Crocker Mixer?
A. Yes sir.
4 Q. The person referred to in Plaintiff's Exhibit 1?
A. Yes sir.
5 Q. When was the last time you saw Mr. Mixer?
A. Just before Thanksgiving, I could not say whether it was two or three days before Thanksgiving, in 1910.
6 Q. Where was that at?
A. At our home in Jackson.
7 Q. Jackson, Nebraska?
A. Yes sir.
8 Q. You were living there?
A. We were living there.
9 Q. How long had you lived there before this?
A. I don't remember just when we moved there.
10 Q. Well about how long?
A. Oh, it was about fifteen years, sixteen.
11 Q. How long have you and Mr. Mixer been married, what year were you married?
A. In 1898, November.
12 Q. And you lived together up to Thanksgiving, a few days before Thanksgiving, 1910?
A. Yes sir.
13 Q. Do you know where Mr. Mixer went to then?
[fol. 74] A. He went into South Dakota on his line of travel.
14 Q. Who was he working for?
A. F. L. McClure, or The Western Wholesale Supply, I think was the name at that time.
15 Q. That is the same F. L. McClure who signed the statement in this case?
A. Yes, F. L. McClure was the Manager.
16 Q. Where did you hear from him in South Dakota?
A. I heard from him at Midland, and the other places I don't remember now.
17 Q. How did you hear from him?
A. By letter.
18 Q. And did he write to you under his own name or an assumed name?
A. Well he usually signed his name either Papa or Walter, he didn't sign his full name.
19 Q. Did he tell you where to write to?
A. The last letters were to be addressed to an assumed name.

20 Q. At what place were you to address the letters?
A. At Midland, and Austin, Minnesota was the last place given.
21 Q. Did you write him at Austin, Minnesota?
A. I did.
22 Q. And did you hear from him?
A. I received no answer.
23 Q. Did you receive your letter back?
A. I did.
24 Q. Have you that letter?
A. No I haven't.
25 Q. Have you got any of the letters that you wrote to him?
A. I have just one, I was in the habit of burning them all just as soon as they came, because they were in the way.
26 Q. Mrs. Mixer do you recall where it was you sent a letter to Mr. Mixer and it came back to you?
A. I sent one to Midland.
[fol. 75] 27 Q. Handing you Plaintiff's Exhibit 4 I will ask you if that is a letter which you wrote to Mr. Mixer and it came back to you?
A. Yes this is one that I wrote and it came back.
28 Q. What town did you address that to?
A. Well I cannot say. I didn't know until just a few months ago that I had this letter, I found it in some pictures that I had put away in an old trunk.
29 Q. You have no letters that he wrote you?
A. I have no letters at all, and just by chance that I had this one.
30 Q. He first wrote to you at Midland, South Dakota, as I understand it?
A. Well, that is the first place that I remember of him giving me the address to write to him.
31 Q. Where was the last address that he gave you to write to him?
A. Austin, Minnesota.
32 Q. And did you write to him at Austin, Minnesota?
A. I did.
33 Q. And your letter was returned?
A. My letter was returned. I also wrote to the Postmaster asking him if a person under this name received mail there and he sent me a printed notice that the Postmasters were not allowed to give information, but that I could send a letter with a return date and it would be held until called for or until the expiration of the time, and I did that with- thirty days and that letter came back.
34 Q. The letter on which you put a thirty day return?
A. Yes, it came back to me.
35 Q. When was that? Or when did you last hear from Mr. Mixer?
A. February 4, 1911.
36 Q. Where did you hear from?
A. That was from Midland.
37 Q. And you never heard from him since?
A. No sir.
38 Q. Have you directly or indirectly heard from him?
[fol. 76] A. I have not.
39 Q. You have received no letters?

A. No letters, or any information.
40 Q. And you haven't seen him?
A. No.
41 Q. Have you inquired of his relatives whether they have heard from him?
A. I have, and the understanding always was from the time that he left that if they ever heard they were to let me know, I was to hear right away if they ever heard from him, and they have never heard anything about him, for they have not notified me about it.
42 Q. You have written the different brothers and sisters?
A. The one brother I don't know, I haven't written to him, but the two sisters, in fact one sister I saw at different times during the time he has been gone, the one that used to be at Fremont.
43 Q. Mr. Mixer has a sister at Fremont?
A. Did have, she is at Columbia this year.
44 Q. Going to school?
A. Yes sir.
45 Q. Has he other sisters?
A. He has one sister at Rockford, Illinois.
46 Q. And any other sisters?
A. No.
47 Q. Any brothers?
A. Just the one brother in Colorado.
48 Q. Have you ever heard from him?
A. No I haven't.
49 Q. In no way?
A. My daughter corresponds with one of his girls, but I never knew the family at all.
50 Q. Do you know why Mr. Mixer left Mr. McClure's firm?
A. No I do not.
51 Q. Have you ever talked with Mr. McClure about it?
[fol. 77] A. I did.
52 Q. He told you?
A. He told me that he was short in his accounts.
53 Q. He left once before this time didn't he?
A. Yes.
54 Q. How long was he gone that time?
A. Oh, he was away about six weeks, I really don't remember the exact time.
55 Q. And he came back?
A. Mr. McClure and I coaxed him to come back and take up his work again.
56 Q. He wrote to you all the time he was gone these six weeks?
A. He wrote to his sister and his sister forwarded to me.
57 Q. But you were in communication with him?
A. Yes sir.
58 Q. Previous to this time had he ever left home that way?
A. No.
59 Q. You had lived together all the time since you were married except for the six weeks he was gone?
A. Yes.
60 Q. And you haven't heard anything from him since February, 1911?

A. No I haven't.

61 Q. And you have been in correspondence with the sisters most all the time?

A. Well I did correspond with the one in Rockford, but my daughter corresponded all the time with her, and so I heard from here and the one at Fremont I visited her several times.

62 Q. You wrote some letters to the Modern Woodmen of America about the dissappearance of Mr. Mixer?

A. I did.

63 Q. And you had correspondence with them?

A. Yes sir.

64 Q. I think at one time you wanted his picture put in their paper?

A. Yes sir.

[fol. 78] 65 Q. And they refused to put it in?

A. Yes sir.

66 Q. Do you remember what year it was you had that correspondence?

A. Well I think it was in 1912 or 13, I am not positive.

67 Q. Did you have somebody write to the Modern Woodmen of America for you or did you write yourself?

A. Mr. Kearney carried on the correspondence, for me, Mr. Ed. T. Kearney, the banker.

68 Q. You received some correspondence direct from them concerning this?

A. Well they were sent to Mr. Kearney and then given to me. I might have received one or two direct from the office.

69 Q. Handing you Plaintiff's Exhibit 5 I will ask you if you received that letter from the Modern Woodmen of America?

A. Yes, I received this one.

Mr. Leamer: We offer in evidence Plaintiff's Exhibit 5.

Mr. Pratt: Objected to for the reason that it is immaterial.

Overruled, to which defendant excepts.

Plaintiff's Exhibit 5 was thereupon received in evidence, and the original thereof is attached to this bill of exceptions following, constituting Page 19 hereof.

Mr. Leamer: We offer in Evidence Plaintiff's Exhibit 4.

There being no objection, Plaintiff's Exhibit 4 was received in evidence, and the original thereof is attached to this bill of exceptions following, constituting Page 20 hereof.

[fol. 79] PLAINTIFF'S EXHIBIT 4

Jackson, Neb., Dec. 15, 1910.

DEAR PAPA: Your letter received telling us to write you at Pierre. This leaves us all able to eat so guess we are not very badly off—

I think Minnie & Seba have had the chicken pox but they are all right now. They felt sick a little for one day—I suppose the other two will come next—Frances had a little sick spell last Friday & Friday night. A sour stomach & a little fresh cold. She has been so cross since but does not seem to be sick—How is your cold by this time? Better I hope—It seems you must have been born unlucky or you would not have so much trouble. Why can't you be fortunate like myself—Mrs. Orth would like to buy the pair of turkeys if we would care to sell them, so what do you think about it. The express was $1.70 and what did you pay for them? They are such a hard fowl to raise that they are risky business for a green hand. Leo McGonigal would like to have one for Christmas but I feel as though they were to expensive for me eat. We shall look for a letter right away as soon as you get this telling us all we have asked about, whether you are coming home for Xmas or not and everything else concerning you. I paid lodge dues twice but there is no assessment for Jan. Mr. F. D. Smythe must be clerk now again as he sent the last receipt. Am going to send Dec. dues about the 20″ of this month—I got the line yesterday where you sent me the $20.00. Many thanks "old man"—Let us hear from you right away.

We would like to know where you will be at Christmas time. The kiddies are all feeling pretty well at this writing. Will close now as it must be dinner time & the Kiddies will be here from school—Don't forget to answer this right away—

Yours truely, Vida M. M.

What did you mean about the house?

[fol. 80] PLAINTIFF'S EXHIBIT No. 5

Legal Department Modern Woodmen of America, Rock Island, Illinois

Office of Benj. D. Smith, General Attorney

[Letterhead omitted]

Rock Island, Ill., Jan. 3, 1913.

Mrs. Vida Mixer, Jackson, Neb.

DEAR MADAM: On December 19th I wrote to you concerning closing up the case of W. C. Mixer, but for some reason you have not replied to my letter. However, the Clerk of our Camp advises me that you have remitted to him as late as December 28th for assessments and dues.

I take it that perhaps you have concluded to keep up your husband's certificate, and of course I have no objection to your doing this, but I write to advise you that we will not hold our proposition open to return payments to you, and if you conclude to continue to pay the assessments you will do so with the understanding that the society will not hereafter return the same.

Please write me what you may conclude to do about the matter, so I may be governed accordingly.

I enclose stamped envelope for reply.

Yours very truly, Benj. D Smith, General Attorney, M. W. of A.

[fol. 81] PLAINTIFF'S EXHIBIT 6

"The Modern Woodman," F. O. Van Galder, Editor

Modern Woodmen of America

[Letterhead omitted]

Fraternal Beneficiary Society

Please direct your reply to M. W. of A. Publication Building, Rock Island, Ill.

Rock Island, Ill., January 31, 1913.

Mr. S. P. Leis,
Clerk, Camp 4497,
M. W. of A.,
Jackson, Neb.

ESTEEMED NEIGHBOR:

I am returning to you herewith photograph of Mr. Mixes, as under the rules I am not allowed to insert notices asking for the whereabouts of any one. I am very sorry that I cannot aid Mrs. Mixes in locating her husband, but, of course, cannot afford to conflict with rules laid down for the conduct of the official paper. In a membership as large as ours of over a million men there are thousands of missing relatives and friends, and we were receiving so many requests of this kind that we could not afford to devote the space to these disappearance items, as they were crowding out matters of general interest to our members, also I wish to state that in no case would I be permitted, under

a part of
Pltiffs Exhibit No. 6.

a ruling promulgated by our Legal Department, to advertise for the whereabouts of a missing member of our Society. Trusting that you understand the position I am forced to take in this matter, I remain,

Fraternally yours, F. O. Van Galder, Editor Modern Woodman.

[fol. 82] JENNIE VIDA MIXER

Direct:

70 Q. Handing you Plaintiff's Exhibit 6 I will ask you where you received that letter?

A. This is from the Jackson Camp.

71 Q. Did you have the Clerk of the Jackson Camp write into the Headquarters of the Modern Woodmen?

A. The home camp at Elk Point, had that done, his camp.

72 Q. There is attached to this letter a picture. Who sent that in to the Headquarters of the Modern Woodmen of America?

A. Well I would not say whether it was thru the home camp or the Jackson Camp, I am not certain.

73 Q. You gave that picture to one or the other?

A. Yes.

74 Q. And this letter was given to you by the Clerk of the Camp at Jackson?

A. Yes.

75 Q. And the picture?

A. Yes.

Mr. Leamer: We offer in Evidence Plaintiff's Exhibit 6.

Mr. Pratt: Objected to as immaterial.

Overruled, to which defendant excepts.

Plaintiff's Exhibit 6 was thereupon received in evidence, and the original thereof is attached to this bill of exceptions following, constituting Page 22 hereof.

[fol. 83] 76 Q. Handing you Plaintiff's Exhibit 7 I will ask you if that is a letter which you received from the Modern Woodmen of America?

A. This is one that I received when I was with my mother.

77 Q. That was one you received when you were with your mother?

A. Yes, I had two, one went to Jackson and my son forwarded it to me, and the other was sent to Naper, Nebraska, where my mother was.

Mr. Leamer: We offer in evidence Plaintiff's Exhibit 7.

Mr. Pratt: Objected to because it is immaterial and does not reach any issue in this case.

Overruled, to which defendant excepts.

Plaintiff's Exhibit 7 was thereupon received in evidence, and the original thereof is attached to this bill of exceptions following, constituting Page 24 of this bill of exceptions, viz:

[fol. 84] PLAINTIFF'S EXHIBIT 7

Legal Department, Modern Woodmen of America

Truman Plantz, General Attorney

[Letterhead omitted]

Warsaw, Ill., January 7, 1920.

Mrs. Viola Mixer, Jackson, Nebraska.

DEAR MADAM: I have been trying to get some information regarding your husband, W. C. Mixer, but so far have been unable to get any trace of him.

I am writing to ask if you have received any word from or regarding him and I enclose self addressed stamped envelope for your reply.

Yours truly, Truman Plantz, General Attorney, M. W. of A.

[fol. 85] JENNIE VIDA MIXER

Direct:

78 Q. Mrs. Mixer you wrote to his different sisters and relatives soon after he disappeared did you, about his disappearance?

A. Yes sir.

79 Q. And thru these letters it was the understanding if anything was heard from him that they would write to you, and that you would write to each other?

A. Yes sir.

80 Q. Have you ever heard from any of these sisters recently?

A. I did.

81 Q. Have you those letters?

A. I have.

82 Q. Handing you Plaintiff's Exhibit 8 I will ask you if this is one of the letters you received from one of the sisters of Mr. Mixer?

A. Yes.

83 Q. What sister is that from?

A. This letter is from the sister at Rockford.

84 Q. You just received that recently?

A. Recently, yes sir.

Mr. Leamer: We offer in evidence Plaintiff's Exhibit 8.

Mr. Pratt: Objected to as immaterial, because it does not reach or tend to reach any of the issues in the case.

Overruled, to which defendant excepts.

Plaintiff's Exhibit 8 was thereupon received in evidence and the original thereof constitutes Page 26 hereof.

[fol. 86] PLAINTIFF'S EXHIBIT 8

618 S. Third St., Rockford, Ill., Nov. 13, 1921.

DEAR VIDA: I- seemed good to hear from you again directly, for of course Minnie always tells me about you all, and also Eva tells me. I sent your letter to Eva, she is having a delightful time in the city there is*en*t much that is good to see but what she sees i*t* especially in the line of good plays and good music, her address i*f* 105 Morning Side Drive, New Yor*d*k City, N. Y. No I haven't heard anything of Walter either directly or indirectly. Since he went away. Your lawyer wrote me making the same inquiries last year. We also are having a min-ature winter after just the lovliest fall. I can't help but think we will have some pleasant weather yet. I wrote Minnie last week. I am glad she is liking her school better. Eva said it was a very desirable one, love to you all from Ralph and

Very truly yours, Minnie M. Rowe.

JENNIE VIDA MIXER

Direct:

85 Q. Handing you Plaintiff's Exhibit 9 I will ask you if that is a letter received from one of Mr. Mixer's sisters?
A. Yes.
86 Q. What sister is that from?
A. His sister Eva Mixer.

Mr. Leamer: We offer in evidence Exhibit 9.

[fol. 87] Mr. Pratt: Objected to for the reason that it is incompetent, irrelevant and immaterial, self-serving and hearsay.

Overruled, to whic*k* defendant excepts.
Plaintiff's Exhibit 9 was thereupon received in evidence, and the original thereof constitutes Page 28 of this bill of exceptions.

87 Q. Mrs. Mixer did the Sheriff of Dakota County make any inquiry for you concerning the whereabouts of Mr. Mixer?
A. He was to send out some cards that were printed.
88 Q. He had some cards printed?
A. Yes.
89 Q. Have you one of those cards?
A. I have.
90 Q. Handing you Plaintiff's Exhibit 10 I will ask you if it is one of the cards that the Sheriff had sent out?
A. Yes sir.
91 Q. Do you know how long ago it was that the sheriff had these sent out?
A. Well it wasn't so very long after, I didn't hear from him——

PLAINTIFF'S EXHIBIT 9

#106 Morningside Drive,
New York City, N. Y., Nov. 13, 1921.

MY DEAR VIDA: Your letter came by the way of Rockford this week. I surely hope that you will get your insurance, as brother Walter is undoubtedly dead. Walter had faults as we all have, but he loved his family dearly, and would never have remained away from them all these years without attempting to get into communication with them. As you know none of us have heard from him since his disappearance more than ten years ago. We all believe him dead and have for a number of years. You have kept up the insurance for your children all these years and surely no lodge, ins-ituted for family protection will deny you the claim. I am sure you will get it.

[fol. 88] Write me if I can be of any further use to you. I am having a wonderful year at Columbia. I only wish I had come some ten years ago.

With love, I am,

Your sister, Eva E. Mixer.

JENNIE VIDA MIXER

Direct:

—but I would not say what year.

92 Q. A year or two afterwards?

A. Possibly.

93 Q. It wasn't over two years afterwards?

A. I don't think so.

94 Q. It was more than seven years ago?

A. Oh, yes.

Mr. Leamer: We no- offer in evidence Plaintiff's Exhibit 10.

Mr. Pratt: Objected to as incompetent, irrelevant and immaterial.

Overruled, to which defendant excepts.

Plaintiff's Exhibit 10 was thereupon received in evidence, and the original thereof is attached hereto, constituting page 30 of this bill of exceptions.

95 Q. I think you testified that you have not heard directly or indirectly since February, 1911, of Mr. Mixer?

A. I have not heard from him in any way.

96 Q. Nor any of the relatives that you have been in correspondence with?

A. No they haven't.

[fol. 89] Cross-examination by Mr. Pratt:

97 Q. You say he left one time prior to this last time?

A. Yes sir.

98 Q. How long was he absent then?

A. About six weeks.

PLAINTIFF'S EXHIBIT 10

INFORMATION WANTED

Concerning the whereabouts of the following described person, who has been missing since November, 1910:

Walter C. Mixer.
Height 6 feet, 1 inch.
Age 54 years, May, 1913.
Black hair, sprinkled with gray.
Size of shoe, No. 8.
Rather small hands and short fingers.
Weight about 170 pounds.
Stooped shoulders. Affected by chronic bronchitis.
Small dark brown eyes, wore farsighted glasses.

Left home at Jackson, Neb., just before Thanksgiving, 1910; last word received from him was on February 4, 1911, from Midland, South Dakota; is a member of the M. W. A. Camp No. 1957, Elk Point, South Dakota.

Any information will be thankfully received.

Frank Mahon, Sheriff, Dakota City, Neb.

JENNIE VIDA MIXER

Cross:

99 Q. And was he short in his accounts that time he left?
A. That is a matter I didn't know anything about at that time.
100 Q. Didn't he ever talk to you?
A. He would not talk to me about it when he came back.
101 Q. He didn't give you any reason why he done it?
A. No.
102 Q. Made no statement why he was absent six weeks?
A. No.
[fol. 90] 103 Q. Was it six weeks or six months?
A. Six weeks.
104 Q. Do you know where he was during those six weeks?
A. No I don't, only that he told me that he was at his sister's at Rockford. That is the only place that he told me where he was.
105 Q. But he quit his position with this firm in Sioux City at that time?
A. Yes, sir.
106 Q. You heard from others that he was short in his accounts?
A. I heard from Mr. McClure the second time.
107 Q. That he was short the first time?
A. That he was short, yes.
108 Q. As a matter of fact you made up that first shortage yourself?
A. Well my sister in law and I did.
109 Q. You paid part?
A. Yes.

110 Q. How long between the first time he returned and his leaving the second time?

A. It was during the summer of 1910 that he was away and Mr. McClure made him a pretty fair offer to come back and go to work and make up his line of travel again.

111 Q. How long was it after he came back the first time before he went away the second time?

A. Well he was gone in August, was when I didn't hear from him first, and it was in November the following that he went away and I have never seen him since.

112 Q. And he never gave you any explanation why he went the first six weeks?

A. No sir, he would not talke to me about it.

113 Q. You never asked him any questions about it?

A. Yes sir.

114 Q. But he never made any reply?

A. He would not tell.

[fol. 91] 115 Q. He refused to converse with you at all about his disappearance?

A. Yes sir.

116 Q. And all you know about his shortage the first time was what Mr. McClure told you?

A. Yes sir.

117 Q. Did your husband know that you arranged to pay a portion of this money back and did pay a part of it back?

A. No sir.

118 Q. He didn't know?

A. No sir.

119 Q. You didn't pay that until after he left the second time?

A. Yes sir I paid that before the second time.

120 Q. Before he left the second time?

A. Yes sir.

121 Q. Now when did he leave the second time? About what time?

A. Just before Thanksgiving of that year.

122 Q. That was after he had been employed by the McClure Company and he went then to some place in South Dakota?

A. Yes, his line of travel was up thru Mitchell, and beyond Mitchell.

123 Q. Did he have a team to travel with?

A. Yes, the last time.

124 Q. Was that team his own or did it belong to the company?

A. I don't think that he had any interest in it, he might have had.

125 Q. It belonged to the McClure Company?

A. I think it did.

126 Q. Do you know what became of that *time*?

A. No.

127 Q. Did you ever make any inquiry about it?

A. We did.

128 Q. And never found out?

A. Never heard a thing.

129 Q. You don't know whether he took the team or not?
[fol. 92] A. The last time I talked with Mr. Clure he told me he didn't know.
130 Q. Altho it was McClure's team?
A. Yes sir.
131 Q. Did they make any effort to find out where the team was?
A. He said he did.
132 Q. And could not find it?
A. Could not find it.
133 Q. I believe that he was at Midland South Dakota when you heard from him in Dakota?
A. Yes sir.
134 Q. Did you ever go to Midland, South Dakota, to find out whether he had been there?
A. No I didn't, I had no means to go.
135 Q. Did you write to that place?
A. No I didn't, I don't think I did.
136 Q. When did you hear from him next after Midland, South Dakota?
A. I never hears from him after Midland.
137 Q. You got a letter from him at Midland?
A. Yes sir.
138 Q. Telling you to write some place else?
A. Yes sir.
139 Q. That was Austin, Minnesota?
A. Yes sir.
140 Q. And he told you to write him under an assumed name?
A. Yes, sir. (Interlineation made by me. H. C. Lindsay, Clerk Supreme Court Nebraska.)
141 Q. Did he give any reason why?
A. No he didn't given any reason, exactly.
142 Q. Had he ever done that before?
A. No sir.
143 Q. Never had asked you to write him under an assumed name?
A. No sir.
144 Q. You wrote to him at Austin, Minnesota under this assumed name?
A. Yes sir.
145 Q. When did you found out first that he was short the second [fol. 93] time he left?
A. Just about Christmas.
146 Q. Of 1910?
A. Yes sir.
147 Q. Have you ever heard how much he was short in his accounts?
A. Mr. McClure told me about fifteen hundred dollars.
148 Q. Do you know whether any portion of the amount he was short the first time had ever been paid back other than what you and your sister paid?
A. No.

149 Q. Do you know what his shortage was the first time?
A. No sir.
150 Q. About a thousand dollars.
A. I really don't know.
151 Q. You know how much you paid back on that shortage?
A. Well, yes, I know how much money was sent for me.
152 Q. How much did you and your sister pay back on that shortage?
A. Two Hundred dollars.
153 Q. How long after he left or he said he was to leave Midland, South Dakota, did you write to Austin, Minnesota?
A. Well I wrote within about a week's time.
154 Q. Would that be along about Christmas that you wrote, or after Christmas?
A. After Christmas.
155 Q. When did you get the final letter from him, Mrs. Mixer?
A. February 4, 1911.
156 Q. And where was that?
A. I don't remember.
157 Q. Was that at Austin, Minnesota?
A. No, I never heard from Austin, only from the Postmaster.
158 Q. Did he say anything in that letter about writing him under an assumed name, or is that the letter in which he told you to write under an assumed name*d*?
A. Yes, that was the letter.
[fol. 94] 159 Q. You are not able to state now whether that was at Austin, Minnesota or whether it was at Midland or some other town?
A. I never heard from him at Austin, Minnesota.
160 Q. Then the letter you received February 4, 1911 was from Midland, South Dakota?
A. Yes sir.
161 Q. And you think in this letter he told you to write under an assumed name?
A. I have had two from Midland and one letter I don't remember where it did come from.
162 Q. Did he sign his name to that letter?
A. He *just* it just "Walter."
163 Q. How many letters did you write to him under this assumed name?
A. I wrote one to Midland, and two, that is one to the Postmaster at Austin, and one to him at Austin.
164 Q. When were you married to Mr. Mixer?
A. November 1898.
165 Q. How long had you know- him before you were married?
A. About four months.
166 Q. And how old a man was he at that time?
A. About thirty-eight or thirty-nine.
167 Q. Did he have a trade or was he always engaged in selling goods or kindred occupations?
A. I think he had a stationary engineer license, I know he worked at that at one time in Chicago.

168 Q. But during your married life was he engaged in this one occupation principally of selling goods?

A. In selling clothing and grocer-s together.

169 Q. He had always been a salesman during your married life?

A. Not always, for several years he worked on the section at Jackson.

170 Q. Where is Jackson?

A. It is about ten miles west of here.

[fol. 95] 171 Q. You live now in this country?

A. Yes sir.

172 Q. Where do you live?

A. I am living at Jackson.

Redirect examination by Mr. Leamer:

173 Q. Mrs. Mixer you had several conversations with Mr. McClure about Mr. Mixer did you not?

A. Yes sir.

174 Q. And it was the understanding between you two that if either one would hear from him to leave the other one know?

A. Yes sir.

175 Q. And Mr. McClure has never heard?

A. He has never sent me any word. I haven't seen him for sometime, but I promised that if I ever heard I should let him know and he promised me the same thing, that he would tell me if he heard or found any trace of him, he told me he would do that, and I have never heard.

176 Q. You have lived at Jackson ever since the dissappearance of Mr. Mixer?

A. Except two years that I worked in Sioux City and I was in Montana from April until August, the last of July.

177 Q. How big a family do you have?

A. I have four children.

178 Q. How old is the oldest one now?

A. Twenty-one.

179 Q. And the youngest one?

A. Thirteen tomorrow.

180 Q. How many of them are with you?

A. I have the two youngest ones with me.

181 Q. You made all your inquiries, mostly by letter and writing, didn't you?

A. Yes sir.

182 Q. The reason I think you stated you didn't go to Midland I believe was that you didn't have the money?

[fol. 96] A. No means to prosecute a search.

183 Q. As a matter of fact you were on the county, getting help from the county for several years, weren't you?

A. Yes sir.

184 Q. When you had the children in school at Jackson?

Q. Yes sir.

Witness excused.

MINNIE M. MIXER, a witness for the plaintiff, was regularly sworn and testified as follows:

Direct examination by Mr. Leamer:

185 Q. Are you the daughter of Mrs. Mixer the plaintiff in this action?

A. Yes sir.

186 Q. Are you the oldest child?

A. Yes sir.

187 Q. What are you doing now?

A. Teaching at Blair, Nebraska.

188 Q. You have been home practically — of the time for the last ten or eleven years?

A. All but the last four, I have been teaching away, but I have been home at different times during these times.

189 Q. You was home back and forth?

A. Yes sir.

190 Q. Were you home when your father disappeared?

A. Yes sir.

191 Q. Do you remember when it was he left?

A. I can remember ten years back, but before that I can't remember, only I can remember the morning he left we went to the train with him, just before Thanksgiving and he promised to be back by Christmas time.

192 Q. And he never came back?

A. No.

193 Q. You have never seen him since that time?

[fol. 97] A. No sir.

194 Q. That was over ten years ago?

A. Yes, I can remember ten years, but before that time I cannot.

195 Q. Have you heard directly or indirectly from him in any way?

A. No sir.

196 Q. You have had correspondence with the daughter, I think, of his brother in Colorado?

A. Yes sir.

197 Q. And in your correspondence with them did you tell them about your father being gone?

A. Yes sir.

198 Q. And have they ever written whether they had heard from him or not?

A. No, they never have.

199 Q. You mean they never had heard from him?

A. At least they never said anything about it.

200 Q. Did you ever get any letters from, what is the name of the brother who lives in Colorado?

A. Henry Mixer.

201 Q. Would you know his writing if you saw it?

A. No I n-ver have seen it.

202 Q. I think you testified you have been home all except the last four years?

A. Yes.

203 Q. And you know of your father not being home any of that time?

A. Yes.

204 Q. And you have never heard from him?

A. No sir.

The defense declined to cross examine witness.

Witness excused.

Mr. Leamer: The plaintiff rests.

[fol. 98] Mr. Pratt: The defendant rests.

There was nothing further on behalf of either the plaintiff or defendant.

REPORTER'S CERTIFICATE

I, the undersigned, Robert G. Fuhrman, Official Stenographer of the District Court of the 8th Judicial District of the State of Nebraska, do hereby certify the above and foregoing to be a true and correct copy of the original shorthand notes taken by me upon the trial of the case of Jennie Vida Mixer, Plaintiff, v. Modern Woodmen of America, Defendant.

I, further certify that the within attached exhibits, identified as Plaintiff's Exhibits 1 to 10, inclusive, are the original exhibits offered and received upon the trial of the within stated action, and all the exhibits, and constitute all of the documentary evidence offered and received upon said trial.

Dated at Pender, Nebraska, January 23, 1922.

Robert G. Fuhrman, Official Stenographer, Eighth Judicial District of Nebraska.

[File endorsement omitted.]

[fol. 99] IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

PRÆCIPE FOR NOTICE OF APPEAL—Filed February 27, 1922

To the Honorable Harry C. Lindsay, Clerk of the Supreme Court:

You will please issue notice of appeal in the above entitled cause.

The Appellant, Modern Woodmen of America, is appealing from a judgment entered in the District Court of Dakota County, Nebraska, for the sum of $2,046.65 and cost taxed at the sum of $12.80, entered against the said Modern Woodmen of America on the 10th day of January, 1922, in an action pending, in which

Jennie Vida Mixer was plaintiff and Modern Woodmen of America was defendant. The said Modern Woodmen of America is Appellant herein and the said Jennie Vida Mixer is Appellee herein.

Modern Woodmen of America, by Nelson C. Pratt, Its Attorney.

[File endorsement omitted.]

[fol. 100] THE STATE OF NEBRASKA, ss:

IN SUPREME COURT OF NEBRASKA

NOTICE OF APPEAL—Filed March 3, 1924

To the Sheriff of the County of Dakota:

You are hereby commanded to notify Jennie Vida Mixer that an appeal has been taken to the Supreme Court of the State of Nebraska by Modern Woodmen of America, a corporation, asking the reversal of a judgment against it rendered on the 10th day of January, A. D. 1922, in a certain cause in the District Court of Dakota County, wherein Jennie Vida Mixer was Plaintiff, and Modern Woodmen of America, a corporation, was Defendant.

You will make due return of this notice on or before thirty days after the date hereof.

Witness my hand and the Seal of said Court, at the City of Lincoln, this 27th day of February, 1922.

H. C. Lindsay, Clerk, by P. F. Greene, Deputy. (Seal.)

Service of the within Notice of Appeal acknowledged this 1st day of March, 1922.

Jennie Vida Mixer, Appellee, by Geo. W. Leamer, Attorney.

[File endorsement omitted.]

[fol. 101] SUPREME COURT OF NEBRASKA, NOV. 22

ARGUMENT AND SUBMISSION

The following causes were argued by counsel and submitted to the Court:

[Title omitted]

A. M. Morrissey, Chief Justice.

* Day and Good, JJ., not sitting.
† Rose, J., not sitting.

[fol. 102] SUPREME COURT OF NEBRASKA

[Title omitted]

JUDGMENT—Rendered December 31, 1923

This cause coming on to be heard upon appeal from the district court of Dakota county, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said district court. It is, therefore, ordered and adjudged that said judgment of the district court be, and hereby is, affirmed at the costs of appellant, taxed at $——; for all of which execution is hereby awarded, and that a mandate issue accordingly.

Opinion per Curiam.

A. M. Morrissey, Chief Justice.

[fol. 103] IN NEBRASKA SUPREME COURT

[Title omitted]

OPINION—Filed December 31, 1923

No syllabus.

[fol. 104] Heard Before Morrissey, C. J., Letton, Day, and Dean, JJ., Shepherd, District Judge

PER CURIAM:

For the reasons given in Garrison v. Modern Woodmen of America, 105 Neb. 25, Coverdale v. Royal Arcanum, 193 Ill. 91, and Boynton v. Modern Woodmen of America, 148 Minn. 150, the judgment of the district court is affirmed.

[fol. 105] IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

MOTION FOR REHEARING—Filed January 23, 1924

Comes now the appellant and moves the Court to vacate and set aside the judgment and opinion heretofore rendered herein and to grant a rehearing for the following reasons:

I

Because the Court erred in failing to find and decide that the District Court of Dakota County erred in sustaining the demurrer of plaintiff appellee herein to the first division of the affirmative

grounds of defense of defendant's appellant's herein answer, and thereby failed to give full faith and credit to the judgment of the Supreme Court of the State of Illinois in the case of Steen vs. Modern Woodmen of America as pleaded, as required to be done by the Constitution of the United States and the Statutes of the United States although this question was presented and contended for by the appellant both in its brief and in the oral argument.

[fol. 106] II

Because the Court erred in not holding that the full faith and credit clause of the United States Constitution, Article 4, Section 1, and the Statutes of the United States enacted pursuant thereto, were violated by the refusal of the District Court of Dakota County to hold that the appellant, a mutual benefit society, under its charter had the power to enact by-law No. 66, as follows:

"Sec. 66. Disappearance no Presumption of Death.—No lapse of time or absence of disappearance on the part of any member, heretofore or hereafter admitted into the Society, without proof of the actual death of such member, while in good standing in the Society, shall entitle his beneficiary to recover the amount of the Benefit certificate, except as hereinafter provided. The disappearance or long continued absence of any member unheard of, shall not be regarded as evidence of death or give any right to recover on any Benefit certificate heretofore or hereafter issued by the society until the full term of the member's expectancy of life, according to the National Fraternal Congress Table of Mortality has expired within the life of the Benefit certificate in question and this law shall be in full force and effect, any statute of any state or country or rule of common law of any state or country to the contrary notwithstanding. The term 'within the life of the Benefit certificate,' as here used, means that the Benefit certificate has not lapsed or been forfeited, and that all payments required by the By-laws of the Society have been made."

which by-law construed by a judgment of the Supreme Court of the State of Illinois, entered on the twenty-first day of December, 1920, entitled Louisa W. Steen vs. Modern Woodmen of America, as pleaded by appellant, is valid and violates no contract rights of the certificate holder or his beneficiary.

[fol. 107] III

Because the Court erred in not recognizing the controlling effect of the Illinois law as established by the judgment in the case of Steen against appellant, although this decision and judgment were duly pleaded and presented by the record and the questions contended for by the appellant both in its brief and in the oral argument.

IV

Because the Court erred in holding and deciding that the Trial court did not err in holding that appellant did not have the power to

contract with reference to a rule of evidence when the question of power had already been determined by the Supreme Court of Illinois, the home state of the corporation, on the twenty-first day of December, 1920, in the case of Louisa W. Steen vs. Modern Woodmen of America, this judgment and opinion having been duly pleaded and presented by appellant both in its brief and in the oral argument.

V

Because the Court erred in sustaining and affirming the judgment of the District Court of Dakota County in refusing to apply the laws of the State of Illinois, the domicile of the appellant corporation as proved and established by the first division of the affirmative grounds of defense in appellant's answer, and demurred to by appellee, for the purpose of determining the corporate power of the corporation and the rights and liabilities under the contract of membership as set forth in the answer of appellant, and the facts therein alleged duly admitted by the demurrer filed by appellee as required by the Federal Constitution and statutes.

Truman Plantz, George H. Davis, Nelson C. Pratt, Attorneys for Appellant.

[File endorsement omitted.]

[fol. 108] SUPREME COURT OF NEBRASKA

[Title omitted]

ORDER DENYING REHEARING—February 2, 1924

This cause coming on to be heard upon motion of appellant for a rehearing herein, was submitted to the court; upon due consideration whereof, the court finds no probable error in the judgment of this court heretofore entered herein. It is, therefore, ordered and adjudged that said motion for rehearing be, and hereby is, overruled and a rehearing herein denied.

A. M. Morrissey, Chief Justice.

[fol. 109] SUPREME COURT OF NEBRASKA

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed February 4, 1924

To Hon. H. C. Lindsay, Clerk of the above-entitled Court:

You are hereby requested to make a transcript of the record of this cause to be used in an application to the Supreme Court of the United States for a Writ of Certiorari in said cause, the transcript to consist of the record, the appeal in said cause, the opinion of the

Supreme Court of Nebraska, all Journal Entries contained in the records and proceedings of the Supreme Court of the State of Nebraska relating to said cause, the motion for rehearing, the final judgment and decision of the Supreme Court of the State of Nebraska, and your certificate to the record that it is a complete record in said cause.

Dated this 4th day of February, 1924.

Nelson C. Pratt, Attorney for Modern Woodmen of America.

[fol. 110 & 111] [File endorsement omitted.]

[fol. 112] IN SUPREME COURT OF NEBRASKA

[Title omitted]

APPLICATION AND ORDER STAYING THE EXECUTION OF MANDATE—Filed February 4, 1924

Comes now the appellant, Modern Woodmen of America, and represents to the Court that through its Counsel it has ordered a transcript of the proceedings of the trial of the above named case in the District Court, and all of the record and proceedings in the Supreme Court for the purpose of making application to the Supreme Court of the United States for a Writ of Certiorari; that the appellant intends to make such application at the earliest possible time, and through its attorneys is now preparing the application for Writ of Certiorari, together with brief in support thereof; that said appellant, through its attorneys, believes that it has good cause for making said application for Writ of Certiorari and said application is made in the best of faith and is not made for the purpose of delay.

Wherefore, appellant prays that an order may be entered staying the issuance of the mandate until such time as said cause may be docketed and determined in the Supreme Court of the United States, and to fix the amount of a proper bond to be furnished, and for such other relief as may be just and proper.

Nelson C. Pratt, Attorney for Modern Woodmen of America, Appellant.

Jurat showing the foregoing was duly sworn to by Nelson C. Pratt omitted in printing.

[fol. 113] [File endorsement omitted.]

This cause coming on to be heard upon motion of appellant to withhold issuance of mandate, was submitted to the court; upon due consideration whereof, it is by the court ordered that said motion be, and hereby is, sustained, and clerk directed to withhold issuance of mandate until the further order of the court.

A. M. Morrissey, Chief Justice.

[fol. 114] STATE OF NEBRASKA,
County of Lancaster, ss:

CLERK'S CERTIFICATE

I, H. C. Lindsay, Clerk of the Supreme Court within and for the State of Nebraska and custodian of the files and records thereof, do hereby certify that the foregoing, consisting of pages 1 to 113, inclusive, is a true, full and complete transcript of the entire record and proceedings in said Supreme Court in the case of Jennie Vida Mixer v. Modern Woodmen of America, No. 22635, the same being an appeal from the district court in and for Dakota county, Nebraska, together with the opinion filed in said case and the final judgment rendered therein as the same are of record and on file in my said office.

In witness whereof, I have hereunto set my hand and affixed the Seal of said Court, at Lincoln, Nebraska, this 25th day of February, A. D. 1924.

H. C. Lindsay, Clerk Supreme Court Nebraska. (Seal of Supreme Court Nebraska.)

Charges for this transcript, $33.35. Paid by Nelson C. Pratt Feb. 25, 1924. H. C. Lindsay, Clerk.

[fol. 115] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO PRINTING RECORD—Filed March 15, 1924

It is stipulated and agreed by and between Nelson C. Pratt, Counsel for Petitioner, and George W. Leamer, Counsel for Respondent, that in order to save expense in the printing of the record herein Plaintiff's Exhibit No. 1, which appears on page 68 of the original record in this cause may be omitted from the printed record for the reason that the material portions of said Exhibit appear in other parts of the record.

Dated this 10th day of March, 1924.

Nelson C. Pratt, Counsel for Petitioner. George W. Leamer, Counsel for Respondent.

[fols. 116 & 117] [File endorsements omitted.]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

On Petition for Writ of Certiorari to the Supreme Court of the State of Nebraska

ORDER GRANTING WRIT OF CERTIORARI—Filed April 28, 1924

On consideration of the petition for a writ of certiorari herein to the Supreme Court of the State of Nebraska, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

SUBJECT INDEX

PETITION

BRIEF

LIST OF CASES

IN THE

Supreme Court of the United States

October Term, 1923

No. ———

MODERN WOODMEN OF AMERICA,
Petitioner,

vs.

JENNIE VIDA MIXER,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Supreme Court of the United States:

The petition of the Modern Woodmen of America respectfully shows:

I.

The petitioner, the Modern Woodmen of America, is a fraternal beneficiary corporation organized in 1883 under the laws of Illinois, and was and is organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit, having a lodge system with ritualistic form of work and representative form of government, and makes provisions for the payment of benefits to the beneficiaries of deceased members subject to compliance by its members with its constitution and laws (Rec., p. 21).

II.

The petitioner for more than twenty-five years last past has been duly admitted to transact business in Nebraska as a fraternal beneficiary society, and in its entire jurisdiction has more than a million members to whom benefit certificates have been issued (Rec., pp. 22, 44).

III.

On the 18th day of November, 1901, Walter Crocker Mixer became a member of a subordinate body of the petitioner pursuant to a written application for membership, and received a benefit certificate in favor of the respondent, his wife, in the sum of Two Thousand Dollars ($2,000.00) (Rec., p. 4).

IV.

The petitioner's by-laws duly and regularly enacted and in full force and effect at all times from and after the first day of September, 1908, have provided as follows:

> "Sec. 66. *Disappearance No Presumption of Death.*—No lapse of time or absence or disappearance on the part of any member, heretofore or hereafter admitted into the Society, without proof of the actual death of such member, while in good standing in the Society, shall entitle his beneficiary to recover the amount of the Benefit certificate, except as hereinafter provided. The disappearance or long continued absence of any member unheard of, shall not be regarded as evidence of death or give any right to recover on any Benefit certificate heretofore or hereafter issued by the Society until the full term of the member's expectancy of life, according to the National Fraternal Congress Table of Mortality has expired within the life of the Benefit certificate in question and this law shall be in full force and effect, any statute of any state or country or rule of common law of any state or country to the contrary notwithstanding. The term "within the life of the Benefit certificate,' as here used, means that the Benefit certificate has not lapsed or been forfeited, and that all payments required by the by-laws of the Society have been made" (Rec., p. 28).

V.

Under petitioner's charter granted by Illinois, the public acts and statute law of Illinois as it existed at all times subsequent to the year 1893, it had the right and power to

adopt, alter, revise and amend its by-laws, and the by-laws so enacted became a valid and existing part of the contract between the petitioner and the members, including Walter Crocker Mixer, and Section 66 of petitioner's by-laws so enacted as aforesaid, was and is a valid and existing part of the contract between the petitioner and the member, Walter Crocker Mixer, and binding on his beneficiary, the respondent (Rec., p. 29).

VI.

Proceedings in Trial Court

The respondent began this action in the District Court of Dakota County, Nebraska, on the 7th day of October, 1921, alleging in her complaint that the petitioner issued to her husband, Walter Crocker Mixer, a Benefit certificate in the sum of Two Thousand Dollars ($2,000.00), dated November 18, 1901, and that the petitioner promised to pay to respondent, as beneficiary, on the death of her husband the sum of $2,000.00; and that her husband, Walter Crocker Mixer, had been absent from his home and place of residence for over seven years last past, and that his absence had been continuous and unexplained, and that by reason of his absence he was presumed to be dead (Rec., p. 4).

VII.

The petitioner duly filed its answer in this case, setting out that it was a fraternal beneficiary society, incorporated under the laws of Illinois and authorized to do business in Nebraska, and was carried on for the sole benefit of its members and their beneficiaries and not for profit, having a lodge system with ritualistic form of work and representative form of government, and made provision for payment of benefits subject to compliance by its members with its constitution and laws, and alleged that its by-laws, duly and regularly enacted and in full force and effect at all times from and after the first day of September, 1908, included By-law No. 66 set out on page 2 herein. And the by-

law heretofore set out was expressly authorized by and adopted pursuant to the terms of the contract between the parties, which included the statutes of Illinois, the charter, by-laws, application and Benefit certificate. The answer of the petitioner then sets forth certain judicial proceedings had in the courts of the State of Illinois as a basis for the plea which follows that such proceedings, involving as they do a construction by the courts of Illinois of the identical by-law in question in this case, are binding on the courts of Nebraska as to such construction under the full faith and credit doctrine found in Section 1, Article 4, of the Constitution of the United States. Such judicial proceedings are stated thus: On the 13th day of December, 1917, one Louisa W. Steen filed an action at law against this petitioner in the Superior Court of Cook County, Illinois, and in her declaration for cause of action, alleged that on the 15th day of January, 1897, this petitioner issued a certain Benefit certificate to one Albert F. Steen, payable on his death in the sum of $2,000 to Louisa W. Steen, his wife as beneficiary. That on the 7th day of May, 1910, said Albert F. Steen disappeared from his home in the city of Chicago, Illinois, and his absence had continued seven years, and was presumed to be dead, and the said Louisa W. Steen prayed judgment for the sum of $2,000. The petitioner herein, defendant therein, on January 9, 1918, filed a special plea to plaintiff's declaration, alleging that it was a fraternal beneficiary society, that the suit was founded on the contract entered into between Albert F. Steen and the petitioner, which consisted of the application for membership, the Benefit certificate, the by-laws, rules and usages of the society then in force or thereafter enacted, and admitted that the Benefit certificate had been issued to Albert F. Steen for the sum of $2,000; and the plea further alleged that the by-laws of petitioner in force when said Benefit certificate was issued were subsequently amended and modified, and from and after September 1, 1908, the by-laws contained Section 66 as hereinbefore set forth; and the plea concluded with the allegation that

proof of the actual death of Albert F. Steen had never been furnished to the petitioner, and the natural expectancy of life of Albert F. Steen, according to the National Fraternal Congress Table of Mortality, had not expired. That on the 7th day of February, Louisa W. Steen filed a demurrer to petitioner's said plea, alleging that said plea was not sufficient in law to constitute a defense to her action, and thereafter on the first day of June, 1918, the Superior Court of Cook County, Illinois, entered an order overruling the demurrer to the special plea, holding that said by-law was valid and that Louisa W. Steen could not maintain her action. Louisa W. Steen refused to plead further and elected to stand on her demurrer to the special plea. That the action was appealed to the Appellate Court of the First District of Illinois, which court, on the third day of April, 1920, entered an order and judgment affirming the judgment of the Superior Court of Cook County, Illinois. That Louisa W. Steen perfected her appeal in the Supreme Court of Illinois, which is the highest judicial tribunal of Illinois, and on the 20th day of December, 1920, the Supreme Court of Illinois filed an opinion in the case of *Louisa W. Steen vs. Modern Woodmen of America,* 296 Ill. Rep. 104, a full copy of which opinion was made a part of the answer and is found in the record, page 39, whereby the Supreme Court of Illinois affirmed the judgment of the Appellate Court of the First District of Illinois, and held that By-Law 66 is a valid by-law and a valid and existing part of the contract and binding upon the members of this petitioner and their beneficiaries. Thereafter a petition for rehearing was filed in the Supreme Court of Illinois, which petition for rehearing was overruled on February 3, 1921. That the opinion thereupon became final and judgment was thereupon entered in the Supreme Court of Illinois affirming the judgment in favor of this petitioner. The answer in this case further alleged that the constitution and by-laws of this petitioner and the contract rights between this petitioner and its members, and the authority and power of this petitioner under its charter

and the statute law of Illinois, as passed upon by the Superior Court of Cook County, Appellate and Supreme Courts of Illinois, in the case of Steen against the petitioner, are the same as in this case; that the question involved in this case is whether petitioner had the power to enact Section 66 of petitioner's by-laws and is a valid by-law and binding upon the members of the corporation and their beneficiaries, and this is identically the same question which was determined by the Superior Court of Cook County, Appellate and Supreme Courts of Illinois, in the Steen case aforesaid. The said answer further alleged that the validity of Section 66, set out above, was concluded by the aforesaid judgment of the Superior Court of Cook County, Appellate and Supreme Courts of Illinois, and that under Section 1, Article 4 of the Constitution of the United States it was the duty of the trial court to give full faith and credit to the statute law of Illinois, and the judgment of the Superior Court of Cook County, Appellate and Supreme Courts aforementioned in the case of *Steen vs. Modern Woodmen of America* (Rec., pp. 29, 30, 31, 32, 33).

VIII.

The respondent demurred to the petitioner's answer which was by the District Court of Dakota County, Nebraska, sustained, to which the petitioner at the time duly excepted. The filing of the demurrer admits all the facts pleaded in the answer. The petitioner refused to plead further and the defense set forth in petitioner's answer was dismissed, to which ruling of the court the petitioner at the time excepted. The trial court entered judgment for the amount claimed in respondent's petition. An appeal was taken to the Supreme Court of Nebraska and the judgment of the District Court was affirmed. The Supreme Court filed no opinion other than to say that it based its ruling upon the cases of *Garrison vs. Modern Woodmen of America,* 105 Neb. 25; *Coverdale vs. Royal Arcanum,* 193 Ill. 91, and *Boynton vs. Modern Woodmen of America,* 148 Minn. 150 (Rec., p. 104). The Supreme Court omitted in its

opinion any mention of the binding force of the judgment of the Supreme Court of Illinois in the case of *Steen vs. Modern Woodmen of America*, and its interpretation of the powers of petitioner under its charter, although this judgment was pleaded in the petitioner's answer and the failure of the trial court to recognize the holding in the Steen case which was discussed at length both in the oral argument and in the written brief in the Supreme Court, it being in fact the only question raised by petitioner (Rec., p. 33).

IX.

Reasons for the Allowance of the Writ

The courts of Illinois have sustained petitioner's by-law and held that the adoption of the by-law, which has been hereinbefore set out, was within the power of the corporation as given to it by its charter issued by Illinois and the statutes of Illinois relating to fraternal beneficiary societies. The by-law in question was merged in the contract between the petitioner and Walter Crocker Mixer, and the real question decided by the Supreme Court of Illinois in the case of *Steen vs. Modern Woodmen of America* was that the petitioner, defendant therein, had the power under its charter and the statute of Illinois to enact this by-law, which relates to a rule of evidence.

This same doctrine was announced in the case of *Wisconsin vs. Pelican Insurance Co.*, 127 U. S. 265, in the following language:

> "The provisions of the constitution and of the Act of Congress by which the judgments of one state are to have faith and credit given to them in another state established a rule of evidence rather than of jurisdiction. They do not affect the jurisdiction of the Court in which the judgment is rendered or of that in which it is offered in evidence."

The ruling on the demurrer to the answer in the trial court was of the same effect as if the judgment in the Steen

case had been offered in evidence and excluded by the trial court.

The petitioner having been organized and chartered under the laws of Illinois it follows that on all matters which relate to its power to do a given act, such as the adoption of the by-law hereinbefore set out, is to be determined by the courts of that state, the domicile of the corporation. Wherever a corporation goes to transact business it carries with it its charter and the interpretation of the power of that charter by the courts of the state where the corporation is organized. The District Court of Dakota County and the Supreme Court of Nebraska failed to give full faith and credit to the judgment in the case of *Steen vs. Modern Woodmen of America, supra*, by not following the conclusion reached in that case as to the power of petitioner under its charter and the laws of Illinois.

If the judgment rendered in the case of *Steen vs. Modern Woodmen of America* by the Supreme Court of Illinois is not controlling as to the power of the corporation to enact By-Law 66 relating to disappearance of members, then the funds of the Society would be distributed by one rule in Illinois and by another rule in Nebraska. Chief Justice White, in the case of *Royal Arcanum vs. Green*, 237 U. S. 531, said in substance that a fund which was distributed by one rule in one state and by a different rule somewhere else would, in effect, amount to no distribution.

The legislature of Nebraska has not deemed it advisable to limit the charter powers of foreign fraternal beneficiary societies by providing that such fraternal beneficiary societies may not contract in reference to a rule of evidence. Until the legislature makes invalid the right of a fraternal beneficiary society to contract with reference to a rule of evidence the power of the petitioner as set forth in its charter, and interpreted by the courts of Illinois, is unimpeached and paramount, and the failure of the District Court of Da-

kota County and of the Supreme Court of Nebraska to recognize the controlling effect of the judgment rendered by the Supreme Court of Illinois in the case of *Steen vs. Modern Woodmen of America* was the failure of the courts to give full faith and credit to the public acts, records and judicial proceedings of Illinois, and to the judgments and decisions of the highest tribunal of Illinois, the place of petitioner's incorporation and domicile, in construing the validity of By-Law 66, and this is a violation of Section 1, Article 4 of the Constitution of the United States.

X.

The petitioner presents herewith a brief showing more fully its views upon the questions involved, and a certified copy of the record of said cause including the proceedings of the Supreme Court of Nebraska.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of Nebraska, commanding said court to certify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of said court in said cause entitled *Jennie Vida Mixer, Appellee vs. Modern Woodmen of America, Appellant*, to the end that the said cause may be reviewed and determined by this Court as provided by law, and your petitioner prays that the judgment of said Supreme Court of Nebraska in said cause be reversed by this Honorable Court.

MODERN WOODMEN OF AMERICA,
Petitioner.

NELSON C. PRATT,
Counsel for Petitioner.

TRUMAN PLANTZ,
FRANK M. MCDAVID,
GEORGE G. PERRIN,
GEORGE H. DAVIS,
Of Counsel.

STATE OF NEBRASKA,
COUNTY OF DOUGLAS. } ss.

I, NELSON C. PRATT, being duly sworn, depose and say that I am one of the counsel named in the foregoing petition, that I have read the petition and know the facts therein contained and that the same are true to the best of my knowledge and belief.

NELSON C. PRATT.

SUBSCRIBED and sworn to before me this 28th day of February, 1924.

ETHEL G. MAGNEY,
[SEAL] *Notary Public.*

Counsel's Certificate of Merit

I hereby certify that I have examined and read the foregoing Petition for Writ of Certiorari; that in my opinion such petition is well founded and should be granted by this Honorable Court, and that said petition is not filed for delay.

NELSON C. PRATT,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1923

No. ———

MODERN WOODMEN OF AMERICA,
Petitioner.

vs.

JENNIE VIDA MIXER,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT

The Supreme Court of Nebraska decided this case without writing an extended opinion, and based its conclusion solely upon the doctrine announced in the cases of *Garrison vs Modern Woodmen of America*, 105 Neb. 25; *Coverdale vs. Royal Arcanum*, 193 Ill. 91, and *Boynton vs. Modern Woodmen of America*, 148 Minn. 150, upon the assumption that there was no distinction between these cases and the instant case. The conclusion was reached in the *Garrison case, supra,* on the grounds that the society did not have the power to enact such by-law, and that such by-law was an unreasonable invasion of the rights of the member, and consequently did not prevent the beneficiary from recovering.

The *Boynton case, supra,* decided by the Supreme Court of Minnesota, was on exactly the same issue as the one de-

cided in the Garrison case. In the *Coverdale case, supra,* the question involved was one of forfeiture and did not involve the question raised in this case.

The real question is, did petitioner have the power under its charter granted by Illinois and the statutes of Illinois to enact the by-law in question and thereby contract with refreence to a rule of evidence, as set forth in this by-law? The Supreme Court of Illinois, in the case of Steen against petitioner, held this by-law valid and its enactment within the power given it by its charter. When the petitioner came into Nebraska to transact business as a fraternal beneficiary society it brought its charter with it, and its power to do any given thing is to be determined by that charter and the interpretation of it by the courts of Illinois. If the petitioner had the power to enact this by-law under its charter as interpreted by the courts of Illinois, the domicile of the corporation, then the courts of Nebraska were bound to recognize this power and the validity of this by-law as interpreted by the courts of Illinois. The District Court of Dakota County, in failing to overrule the demurrer filed by respondent to the answer of petitioner, and the Supreme Court of Nebraska in affirming the decision of the District Court, failed to give full faith and credit to the decision and judgment of the courts of Illinois in the case of *Steen vs. Modern Woodmen of America.*

The by-law as enacted by the petitioner is valid under the interpretation of the courts of Illinois, as set forth in the case of *Steen vs. Modern Woodmen of America,* 296 Ill. 104. The question then arises, does this particular by-law, which applies to every member of the corporation and gives no advantage to one over another, and the power to enact it, as interpreted by the courts of the home state of the corporation, follow the corporation, in the transaction of business as a fraternal beneficiary society into other states?

Where either the application or benefit certificate contains an agreement on behalf of the member to be bound by after-enacted by-laws said after-enacted by-laws are valid and the member is bound thereby.

The application by the member, Mixer, as shown on page 23 of record, and the benefit certificate on page 6 of record, provide that the laws, rules and usages of the society then in force or which might thereafter be enacted, are part of the contract between the member and the society. The contract, therefore, provided that the member, Mixer, should be bound by all the laws that were legally enacted by the petitioner subsequent to the time of the issuance of his benefit certificate.

Hall vs. Association, 69 Neb. 601.
Funk vs. Stevens, 102 Neb. 681.
Supreme Lodge Knights of Pythias vs. Mims, 241 U. S. 574.
Apitz vs. Supreme Lodge, 274 Ill. 196.
Steen vs. Modern Woodmen of America, 296 Ill. 104.

The Supreme Court of Illinois in the *Apitz case, supra,* in discussing the validity of an after-enacted by-law which related to suspending a member who had been absent and unheard of for a given period, said:

> "A by-law of a mutual benefit society suspending a member who disappears is reasonable so as to be within the operation of a provision in a certificate requiring members to conform to rules subsequently adopted."

In the case of *Steen vs. Modern Woodmen of America, supra,* the court reached the conclusion that the by-law involved in this case was binding upon the member, although it was enacted after the certificate of membership had been issued.

The respondent by interposing a demurrer admitted all the allegations contained in petitioner's answer.

The petitioner elected to stand on its answer to which the demurrer interposed by respondent was sustained and

did not plead further. A general demurrer to a pleading admits all of the facts alleged and the parties so demurring must abide by the consequences which will result from such admissions.

McArthur vs. Clarke Drug Co., 48 Neb. 899.

In discussing the effect of a general demurrer to a pleading, the court, in the case of *Daily vs. Railroad*, 58 Neb. 396, said:

> "A pleading must be said to allege what can by reasonable and fair intendment be implied from its statements, and when assailed by general demurrer all it states is to be considered as admitted, and unless, when viewed in the light of the foregoing rule, there is no cause of action stated the pleading must be upheld".

The condition of the record resulting from the demurrer to the answer filed and judgment of the court thereon, is of the same effect as if a duly authenticated copy of the record of the judgment entered in the case of *Steen vs. Modern Woodmen of America, supra*, had been offered in evidence and by the court rejected.

Corporations can only exercise such powers as may be conferred by the legislative bodies creating them either by express terms or by necessary implication, and that power, whether at home or abroad, depends upon what power was given by the corporation's creator.

The rights of the respondent under the contract of corporate membership of Mixer depend upon the public acts of Illinois, the domicile of the corporation. It is not the purpose to discuss the conflict of laws as applied to actions on insurance contracts. We have no controversy with the legal principles relating to the determination of the effect given to the *lex loci contractus* in such cases.

Mutual Life Ins. Co. vs. Hill, 193 U. S. 551.
Mutual Life Ins. Co. vs. Cohen, 179 U. S. 262.

The application of the law of Illinois to the case arises from the nature of the contract regardless of the place of the contract. It would not matter in what state the contract was entered into outside of Illinois so long as it is a contract of membership in an Illinois corporation. The right arising from it will be determined by the decisions of Illinois unless such decisions are rendered invalid by an express and contrary statute of the state in which the contract is entered into.

The petitioner society was organized under the laws of Illinois relating to fraternal beneficiary societies. Whether the by-law referred to as Section 66 (as set out on page 2) having reference to disappearance cases, is valid or not depends upon the power of the legislative body of the petitioner to enact such by-law.

When the member, Mixer, joined the society he contracted to be bound by by-laws that might be enacted by the petitioner, the society having reserved the power to change the contract between the member and itself. When the petitioner society transacts business in a state other than the state in which it was incorporated it necessarily carries its charter with it, for that is the law of its existence.

The decision in the case of *Royal Arcanum vs. Green*, 237 U. S. 531, is decisive of the questions in this case, in which case the facts appear as follows:

In the case of *Reynolds vs. Supreme Council Royal Arcanum*, 192 Mass. 150, an action was brought by a member of the Royal Arcanum, a beneficiary society, to enjoin the increase of rates of assessment. The plaintiff brought the suit on behalf of himself and of others similarly situated. A decree was entered in the Reynolds case holding that the increase of rates of assessment was valid. The plaintiff, Green, sought in the Courts of the State of New York to enjoin the Royal Arcanum from enforcing the increased rates of assessment which had been determined in favor of the society in the Reynolds case. These new rates

became effective in October, 1905, and when the new rates became effective down to February, 1910, Green paid the amount of the increased assessments monthly, and did so under protest. For four years after the decision in the Reynolds case Green ceased to make the payments required by the by-laws of the corporation, and at the end of the four-year period commenced a suit in the State court of New York against the Supreme Council, assailing the validity of the increase made in the rates of assessments in 1905 on the ground that it was void as exceeding the powers of the corporation and because conflicting with his contractual rights.

The society, in the trial of that case in the state court of New York, after pleading that the decision in the Reynolds case was controlling, offered in evidence an exemplified copy of the record in the Reynolds suit in the Massachusetts Courts. An objection to the introduction of this record in evidence was sustained by the Court. This ruling was affirmed by the Supreme Court of the State of New York and the case finally reached the Supreme Court of the United States. It was claimed by the defendant Society that the action in the Reynolds case was brought on behalf of Reynolds and of others similarly situated, and that such judgment holding the rates valid was binding on all the members, no matter where situated. In discussing that question, the Supreme Court, through Chief Justice White, said:

> "A violation of the full faith and credit clause of the Constitution of the United States results from the refusal of the New York Courts to hold that the power of a Massachusetts Mutual Benefit society under its charter and by-laws so to amend such by-laws as to increase its assessment rates and the rights and duties of the members of a New York subordinate council with respect to such increase are to be determined by the Massachusetts law under which, as construed by a judgment of the highest court of that state, such amendment is valid and violates no contractual rights of the certificate holder."

In the case of *McClement vs. Supreme Court I. O. F.*, 222 N. Y. 470, the question nvolved was whether the society had the power to increase its rates of assessment. The society was organized under the laws of Canada and was transacting business in New York. The Court determined that it was unnecessary to consider whether the power to enact such by-law increasing the rates of assessment was expressly reserved by the society in the contract with the member to change his rate of assessment, because the court reached the conclusion that it had power to change the rates of assessment by the terms of its charter granted by the Parliament of the Dominion of Canada. The Court reached the conclusion expressed in the following language:

> "The charter or articles of incorporation of a beneficial association become a part of the contract of membership when one joins the association as if written therein, and a member is presumed to have joined with knowledge of their terms and conditions."

And in discussing the question whether the society had the power to increase its rates of assessment, the Court said:

> "The defendant in doing business under its charter was not only governed and controlled by it, but was subject to such modifications, restrications and repeal as should from time to time seem to Parliament to be required by the public good. This charter is carried with it wherever it goes. Every contract made by it, whether in Canada or elsewhere, is dependent upon its authority. It is true in this case that the plaintiff is a resident and citizen of the State of New York. In many respects the defendant when doing business in this state is subject to our laws, but its power to contract is dependent upon its charter."

In the Green case *supra*, the facts would have justified the Supreme Court in deciding the question on the theory that the judgment entered in the Reynolds case in the Supreme Court of Massachusetts was *res judicata* and binding on all the members of the society, including Green, who

was a resident of New York. Chief Justice White based his decision upon the theory that the courts of Massachusetts, the home of the corporation, were controlling, and as Chief Justice White stated in his opinion that the conclusion of the court did not require it to consider whether the judgment was conclusive in view of the fact that the corporation, for the purposes of the controversy as to assessments, was the representative of the members.

> "Coming then to give full faith and credit to the Massachusetts charter of the corporation and to the laws of that state to determine the powers of the corporation and the rights and duties of its members, there is no room for doubt that the amendment to the by-laws was valid if we accept, as we do, the significance of the charter and of the Massachusetts law applicable to it, as announced by the Supreme judicial court of Massachusetts in the Reynolds case, and this conclusion does not require us to consider whether the judgment *per se* as between the parties was not conclusive in view of the fact that the corporation, for the purpose of the controversy as to assessments, was the representative of the members."
>
> *Royal Arcanum vs. Green*, 237 U. S. 531.

The case of *Hartford Life Insurance Co. vs. Ibs*, 237 U. S. 662, was decided solely on the question of *res judicata*, but it is assumed from the language used by Chief Justice White in the Green case, *supra*, that if the question of a representative suit was entirely eliminated this would not have changed the conclusion reached by the court.

The decision of the Supreme Court of Nebraska is in conflict with the case of *Hollingsworth vs. Supreme Council*, 175 N. C. 615, in which the court said:

> "It should be noted as important in the consideration of our case what Justice Holmes says in the Mims case, *supra, viz.*, that the clause providing for periodical payments of the same amount so long as the member-

ship continued, was not a contract, but was a regulation subject to the possibilities inherent in the case, and that any other view of it would create a privilege which would attack the corporation in its very life. This is the crux of the whole matter and the vital principle of the case crisply stated and sharply and lucidly defined. The Chief Justice thus concludes the opinion of the Court in *Royal Arcanum vs. Green*, in regard to the effect of the Massachusetts law and its application in other states: 'Coming then to give full faith and credit to the Massachusetts charter of the corporation and to the laws of that state to determine the powers of the corporation and the rights and duties of its members, there is no room for doubt that the amendment to the by-laws was valid if we accept, as we do, the significance of the charter and of the Massachusetts law applicable to it as announced by the Supreme Judicial court of Massachusetts in the Reynolds case.' ''

In the case of *Sovereign Comp W. O. W. vs. Wirts*, 254 S. W. (Texas) 637, the Green case, *supra*, is followed and approved. The court expressed itself among other things as follows:

"Where Nebraska was the state of incorporation of defendant insurance society, a decision of the Nebraska court that a by-law was *ultra vires* must be given effect by the courts of this state (Texas) under the full faith and credit clause of the federal constitution."

It follows that if the court had held the by-law within the power of the corporation, the Texas court would have been controlled thereby.

In the case of *Canada Southern R. R. Co. vs. Gebhard*, 109 U. S. 527, the Court, in discussing the power of a corporation, said:

"A corporation 'must dwell in the place of its creation, and cannot migrate to another sovereignty' (*Bank of Augusta vs. Earle*, 13 Pet. 588, 10 L. Ed. 274), though it may do business in all places where its charter allows and the local laws do not forbid. (*Railroad vs. Koontz*, 104 U. S. 12, 26 L. Ed. 643). But wherever it

goes for business it carries its charter as that is the law of its existence (*Relfe vs. Rundle,* 103 U. S. 222, 26 L. Ed. 337), and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. A corporation of one country may be excluded from business in another country (*Paul vs. Virginia,* 8 Wall. 168, 19 L. Ed. 357); but if admitted, it must, in the absence of legislation equivalent to making it a corporation of the latter country, be taken both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation. Such being the law, it follows that every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign corporation, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and purposes, he submits his contract with the corporation to such a policy of the foreign government, and whatever is done by that government in furtherance of that policy which binds those in like situation with himself, who are subjects of the government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him. He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony. It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharge it from liability there, discharges it elsewhere."

Excerpts from some of the leading cases and text books follow:

"Every corporation necessarily carries its charter wherever it goes, for that is the law of its domicile. It may be restricted in the use of some of its powers while

doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs."

Relfe vs. Rundle, 103 U. S. 222, 226.

"By subscribing to stock in a foreign corporation defendant subjected itself to the laws of such foreign country in respect to the powers and obligations of such corporation."

Nashua Sav. Bank vs. Anglo-American Loan, Mortgage, and Agency Co., 189 U. S. 221.

"By becoming a member of a Minnesota corporation, and assuming the liability attaching to such membership, he became subject to such regulation as the state might lawfully make to render the liability effectual."

Bernheimer vs. Converse, 206 U. S. 516, 533.

"A corporation seeking to invoke the doctrine of comity must be possessed of some right or privilege in the state or county of its domicile, and unless it has both existence and some right or power in such state it cannot be awarded any power in a foreign state. Its powers in another state will be measured by its charter and it will not be allowed to exercise therein any powers not conferred upon it either expressly or impliedly by its charter, or the laws of the state of its incorporation. In other words, a corporation cannot do any act beyond the limits of the state or country of its incorporation which it cannot do therein. Charter limitation on the powers of corporations follow them into every state in which they may do business. It follows that when the question for determination is the capacity or disability of a corporation in any given case, regard must primarily be had to the law of the state or sovereignty from which it has derived its franchises. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. Accordingly, where the charter of a corporation requires that its contracts or other acts shall

be executed in a particular manner, this provision must be complied with when the corporation goes into a sister state. So the laws of the state of incorporation must be consulted where the question involved is the right of the corporation to charge interest at a certain rate. Persons who deal with foreign corporations are chargeable with notice of the provisions of their charters and where they enter into contracts which are clearly *ultra vires*, neither party can maintain an action on the contract in jurisdictions which hold to the strict doctrine of *ultra vires*. A foreign corporation defending an action on the ground of *ultra vires*, should plead the statute of the state of its incorporation so that the courts of the domestic state may be informed of the limitations on its powers."

Section 6627, Thompson's second edition on Corporations.

"A foreign corporation doing business in the state brings with it the powers of its charter, unless restricted by the laws or public policy of the state, as the corporation comes as it is created, and brings its charter as the law of its existence. When a state permits a foreign corporation to come into its territory it must be presumed to have consented that the corporation should exercise all of the powers conferred by its charter and the general laws appertaining thereto, unless prohibited from so doing by the direct enactments of the state or by some rule of public policy to be deduced from the general course of legislation. An express grant in the charter of a corporation authorizing it to do business or acquire interests beyond the limits of the state in which it is created is not essential to authorize it to do such acts, but power to act outside the state may be implied. But, as is seen in the section immediately succeeding this, a corporation without power to exercise certain functions in the state of its creation is without power to exercise such functions in another state. In other words, it has no greater powers outside the state in which it was created than it has in the state of its creation."

Section 5721, Fletcher's Cyclopedia of the Law of Corporations.

In the case of *Palmer vs. Welch*, 132 Ill. 141, the Statute of Massachusetts under which the Supreme Council of the Royal Arcanum was organized, provides that such corporations may be formed for the purpose of assisting the widows, orphans, or other relatives of deceased members, or any persons dependent upon deceased members. Appellees were relatives, and came within the meaning of the law. Appellant being neither a relative, nor orphan, nor widow of deceased, nor dependent upon him, did not come within the purview of the Statute. The court said:

"We must respect the construction given to this statute by the Massachusetts courts. In *American Legion of Honor vs. Perry*, 140 Mass. 580, the Supreme Court in that state, in construing the Statute, said: 'The Statute under which the plaintiff corporation is organized gives it authority to provide for the widow, orphans, or other persons dependent upon deceased members, and further provides that such fund shall not be liable to attachment. The classes of persons to be benefited are designated and the corporation has no authority to create a fund for other persons than the classes named. The corporation has power to raise a fund payable to one of the classes named in the Statute, to set it apart, to await the death of a member, and then to pay it over to the person or persons of the class named in the Statute, selected and appointed by the member during his life, and if no one is selected it is still payable to one of the classes named."

"The contract between a fraternal benefit society and its members, evidenced by the application and certificate, is to be construed in accordance with the laws of the state in which the society was incorporated, and in which its certificates of membership are issued, as well as in accord with the charter and general laws of the society."

Supreme Lodge vs. Hine, 82 Conn. 315.

"While the contract was a Connecticut contract, it was conditioned upon the laws of the Society, and its laws, so far as valid, were in harmony with, and all

of its contracts included the statute law of the state of its origin relating to fraternal benefit societies."

Supreme Colony vs. Towne, 87 Conn. 644.

The society last above mentioned was organized under the laws of Massachusetts and had subordinate bodies called Colonies in other states, under its jurisdiction. The Court reached the conclusion that it was a Connecticut contract but that the laws of the state where the society was incorporated were controlling.

The right of a corporation to modify the terms of a contract of a corporate membership in it depends upon the power of the corporation.

Where, as in this case, there is an express and clear reservation of the right to amend, the member is bound to take notice of the existence and effect of that reserved power. The power to enact a by-law generally is inherent in every corporation as an incident to its existence. Whether or not a corporation has power to enact a particular by-law depends in a large measure upon the provisions of its charter and the laws under which the corporation is organized. The right of the beneficiary does not extend beyond the right of the member; in other words, the beneficiary possesses only such rights as the member possesses.

In the case of *Supreme Lodge K. of P. vs. Knight*, 117 Ind. 489, the court, in discussing this question, said:

"It is enough for us to affirm this proposition; and that we may safely do, both upon principle and authority, without attempting to define what greater rights, if any, the beneficiary has than those of the assured. We do not doubt that both the assured and the beneficiary have a right that is in its nature a vested one, but it is not an unqualified vested right. On the contrary, it is qualified and limited in a great degree. It is a right subject to the limitations, conditions, and restrictions of the charter and the by-laws which are factors of the contract."

In discussing the right to amend by-laws which relate to the power of a fraternal beneficiary society, the Supreme Court of the United States, in the case of *Wright vs. Minnesota Mutual Life Insurance Co.*, 193 U. S. 657, said:

> "In the present case we have, by express stipulation, the right to amend the articles, with the reservation noted as to Article 10. Nor does it appear that the changes were arbitrarily made without good and substantial reason. The testimony in this record discloses that the experience of this assessment insurance company was not anomalous or unusual. It was a case of history repeating itself. Insurance payable from assessments upon members may begin with fine prospects but the lapse of time, resulting in the maturing of certificates and the abandonment of the plan for other insurance by the better class of risks, has not infrequently resulted in so increasing assessments and diminishing indemnity as to result in failure. The testimony that such was the history of this enterprise is ample. The changes in 1898 to a plan of issuing, in exchange for certificates and upon new business, a policy having some of the features of old line insurance, seems to have been fully justified by the state of the company's business. And the subsequent change to a policy with straight premiums and fixed indemnity was approved by the majority of the members upon proceedings had under the Minnesota Statute, and has resulted in a successful business and a considerable change of the members to the new and more stable plan. It does not appear that any certificate has been unpaid, nor is any failure shown to levy assessments required under the original articles."

The Supreme Court, in discussing the effects of the law of Minnesota under which the society was organized, said further:

> "In our view of the case the law of Minnesota did not impair the obligation of any contract, nor were the changes in the method and plan of this company beyond its corporate powers."

In the case of *Korn vs. The Mutual Assurance Society*, 6 Cranch (U. S.) 192, the society was incorporated by the legislature of Virginia in 1794. In 1805 the society discovered its country risks were proving much more costly than risks taken on town property. Accordingly, it adopted a by-law placing the town risks in one class at a given rate of assessment and the country risks in another class at another rate of assessment, and providing that a failure to pay assessments should suspend a member's right to insurance. The plaintiffs whose policies were transferred to the country class refused to pay the increased assessment on the ground that the by-law so changed the contract that they were no longer liable under it. The court, in denying the relief claimed, said:

"The liability of the members of this institution is of a two-fold nature. It results both from an obligation to conform to laws of their own making, as members of the body politic, and from a particular assumption or declaration which every individual signs on becoming a member. * * * 'We will abide by, observe, and adhere to the constitution, rules, and regulations which are already established or may hereafter be established by a majority of the assured, * * * or which are, or may hereafter be established by the president and directors of the society.' It would be difficult to find words of more extensive significance than these or better calculated to aid, explain, or enforce the general principle that a *majority of a corporate body must have power to bind its individuals.*"

"As to what is contended to be a material alteration in their charter, we consider it merely as a new arrangement or distribution of their funds; and *whether just or unjust, reasonable or unreasonable, beneficial or otherwise to all concerned, was certainly a mere matter of speculation,* proper for the consideration of the society, and which no individual is at liberty to complain of, as he is bound to consider it as his own individual act. Every member, in fact, stands in the peculiar situation of being party of both sides, insurer and insured.

Certainly the general submission which they have signed will cover their liability to submit to this alteration."

The question involved in the case last above cited was again brought before the Supreme Court of the United States in the case of *Society vs. Korn*, 7 Cranch (U. S.) 396, on the ground that the "former case" had merely established the continuance of the original contract, and that he was not liable for the increased assessment authorized by the change in the by-laws. The court said:

"* * * it is contended that the contract being complete between the parties, the insurers cannot add to the consideration to be paid for insurance. In general this doctrine is unquestionably correct, but peculiar circumstances except this from ordinary cases. This subject was considered in the quoted case decided between these same parties in February, 1810. It is there laid down, and on reflection we are confirmed in the opinion that in the capacity of an individual of the body corporate the defendants are bound by the by-laws of the society as far as is consistent with the nature of its constitution."

"The trial court" (Gaynor, J.) "held that the question was solely one of power * * *. Each member of the society is an insurer as well as an insured, and I think as an insurer he must be deemed to have contracted to pay his just and ratable share of the amount necessary to enable the defendant to keep its contract with its members and pay their dependents the stipulated sum, and the parties who have understood that changed conditions might necessitate a readjustment of rates, and hence that the society, under the reserved power to amend its by-laws assented to by the plaintiff, could make such readjustment."

Mock vs. Supreme Council Royal Arcanum, 121 App. Div. 474, 476, 477.

In the case of *Gaines vs. Supreme Council Royal Arcanum*, 140 Fed. 978, the court, in discussing the right of a corporation to modify the terms of a contract of corporate membership, said:

"It must be apparent that it is an extremely delicate question for the courts of any jurisdiction other than Massachusetts, the state of defendant's creation and the state of its domicile, to interfere by injunction with the internal regulation and management of the affairs of this benevolent association. The contract is, of course, founded not only on the certificate of membership, but in the properly adopted by-laws and regulations, or the laws of Massachusetts under which the association is incorporated, and it is obvious enough that the law of Massachusetts furnishes the rule for the decision of the question now up for disposition and all similar questions relating to this association and its powers and authority. If the court may interfere by injunction in a case like this it must be distinctly upon the closely drawn issue whether vested and constitutionally protected rights are being interfered with or impaired. If the courts of any state may exercise jurisdiction for such purposes outside of the state in which the defendant association was created and has its principal office and domicile, it is equally true that the courts of the forty-three or forty-four different states where members may be can exercise similar power and authority. If this were done it would speedily bring about such a situation as would make emphatic the proposition that the courts of any states other than Massachusetts should only exercise authority to interfere by injunction with the internal management and operation of the association on the clearest and most cogent grounds."

In the *Green case, supra,* the Supreme Court of the United States reached the conclusion that a corporation could modify the terms of the contract with the members only when it was in conformity with the provisions of the charter of the corporation as interpreted by the decisions of the courts of the state in which the corporation was chartered. Chief Justice White said in effect, in his opinion, that when the court of Massachusetts had determined what the power of the society was in reference to the changing of the contractual terms by the enactment of by-laws that that was binding upon the courts of other states, even

though the members resided in such other states; in effect, holding that when the member joined in some state other than Massachusetts his rights were to be detrmined by the charter of the corporation and its powers as interpreted by the courts of Massachusetts, the home state of the corporation.

The corporate powers of the petitioner are measured by the Acts of Illinois.

The legislature of Illinois has determined what is a fraternal beneficiary society. It has stated that such a society shall have a representative form of government and shall exercise the powers of a corporation. Petitioner is transacting business in Nebraska as a fraternal beneficiary society. When Nebraska permitted the defendant to transact business within its borders it thereby consented that this foreign corporation should exercise all of the powers conferred by its charter and the general laws appertaining thereto.

In the case of *Dartmouth College vs. Whitman*, 4 Wheat. 518, Dartmouth College objected to an act of the legislature of New Hampshire relating to its charter, claiming that the legislative act invaded the vested rights of the college. The college had been originally chartered by the Crown. The constitution of New Hampshire did not reserve to the legislature the right to amend laws relating to corporations which would affect the stockholders at the time of such enactment. The court reached the conclusion that inasmuch as the constitution of the state did not reserve the right to amend acts relating to corporations that the legislature did not have the power to interfere with vested rights of the stockholders and that the act so passed was invalid. In other words, the charter as originally granted was controlling and this could not be amended without the consent of the stockholders of the corporation.

In this case the contract provides that the member is to be bound by subsequently enacted by-laws, and in effect, By-law No. 66, relating to disappearance of members, is

the same as though written in the by-laws at the time Mixer became a member of the society, and the power of the society to enact such a by-law is determined by the laws of Illinois relating to fraternal beneficiary societies and the petitioner's by-laws as interpreted by the decisions of that state.

> "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created."
>
> Chief Justice Marshall in *Dartmouth College vs. Woodward*, 4 Wheat. 518.

> "Without ascribing to this body, which, in its corporate capacity, is the mere creature of the act to which it owes its existence, all the difficulties and disabilities annexed by the common law to insure institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it, to deprive all its powers from that act, and to be capable of exerting its faculties only in the manner in which that act authorizes."
>
> Chief Justice Marshall in *Head vs. Providence Ins. Co.*, 2 Cranch. 127.

> "But whatever may be the implied powers of aggregated corporations by the common law and the modes by which those powers are to be carried into operation, corporations created by statute must depend both for their powers and the mode of exercising them upon the true construction of the statute itself."
>
> Justice Story in *Bank of U. S. vs. Dandridge*, 12 Wheat. 64.

> "It may safely be assumed that a corporation can make no contracts and do no acts, either within or without the state which creates it, except such as are authorized by its charter, and those acts must also be

done by such officers or agents and in such manner as the charter authorizes, and if the law creating a corporation does not, by the true construction of the words used in the charter give it the right to exercise its powers beyond the limits of the state, all contracts made by it in other states would be void. A corporation must no doubt show that the law of its creation gave it authority to make such contracts through such agents."

Chief Justice Taney in *Bank of Augusta vs. Earle*, 13 Pet. 519.

In the case of *North American Union vs. Johnson*, 142 Ark. 378, the *Knights and Ladies of Honor* was a fraternal insurance corporation organized under the laws of Indiana and licensed to do business in Arkansas. In April, 1916, it issued to one Richard T. Johnson its benefit certificate for the sum of $2,000. In August, 1916, the Knights and Ladies of Honor attempted to merge with the North American Union, appellant. The appellant is a fraternal insurance society organized under the laws of Illinois. It was never authorized to do business in Arkansas. The question arose as to whether the merger attempted was valid. It was proposed to transfer the members in the Knights and Ladies of Honor to the North American Union without a physical examination. The law relating to fraternal beneficiary societies in Illinois provided that no member could be admitted to membership without a physical examination. The court held that the laws of Illinois were controlling and that the Arkansas courts were compelled to follow the Illinois law. The court said:

"Therefore, under the laws of Illinois, as well as of the laws of appellant, medical examinations are required as a prerequisite to membership in fraternal benefit societies. A certificate issued without such medical examination is an *ultra vires* act upon the part of the corporation which renders such certificate not only voidable but wholly void and of no legal effect. Hence, neither party to such an alleged contract could be estopped by any acts done under it, from showing that the pur-

ported contract was in violation of the laws of the state."

The court in the case last above cited, follows and approves the rule announced in *Royal Arcanum vs. Green,* 237 U. S. 532, in the following language:

> "The rights of members of a corporation of a fraternal and beneficiary character have their source in the constitution and by-laws of the corporation and can only be determined by resort thereto, and such constitution and by-laws must necessarily be construed by the law of the state of its incorporation."

In the North American Union case, *supra,* it appeared that the merger had been held invalid by the courts of Illinois. While the decree was rendered by the Circuit Court of Illinois, although an inferior court, was nevertheless a court of general jurisdiction, and the court reaches the conclusion that, inasmuch as that decree was not appealed from, it was binding upon all parties to it . In disposing of that question the court said:

> "Appellant did not appeal from that decree but on the contrary, consented thereto. We, therefore, conclude that, under the laws of Illinois as expressed in her statute and declared by her courts, Johnson, at the time of his death was a member of appellant and a rightful holder of its policy of insurance, and that the beneficiary named therein is entitled to recover in this action unless Johnson had forfeited his right under the policy."

"Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state" implies that the public acts of every state shall be given the same effect by the courts of another state that they have by law and usage at home.

The theory of the constitution is that it applies to the public acts of the state as well as the decisions of the courts. When a corporation, organized under the laws of a given

state, goes into another state to transact business the public acts of the home state of the corporation and the charter of the corporation, are carried with it wherever it goes. Every contract that is entered into, whether in the home state or elsewhere, is dependent upon the authority of the public acts and the charter of the corporation. In relation to the power and authority of the corporation they must be given the same force and effect as in the home state.

"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; and the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof. It is not pretended that any judgment of the state of Ohio was disregarded by the courts of New York, but it is contended that full force and effect was not given to the constitution of the state of Ohio. This duty is as obligatory as the similar duty in respect to the judicial proceedings of that state."

Justice Brewer in *Smithsonian Institute vs. St. John*, 214 U. S. 19.

"* * * in respect to the faith and credit to be given by the courts of one state to the judgments of the courts of another state, and it is equally applicable to the faith and credit due in one state to the public acts of another."

Chief Justice WAITE in *R. R. Co. vs. Wiggins Ferry Co.*, 119 U. S. 615.

"The constitution declares that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and that congress may not only prescribe the mode of authentication, but also the effect thereof. Section 905 prescribes such mode, and adds that the records and judicial proceedings so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken. Such is the Congres-

sional declaration of the effect to be given to the records and judicial proceedings of one state in the courts of every other state. In other words, the local effect must be recognized everywhere through the United States."

Justice Brewer in *Hancock National Bank vs. Farnam*, 176 U. S. 640.

"If this were a case arising in the state of New York we should therefore follow the construction put upon the statute by the courts of that state. The circumstance that the case comes here from the state of Florida should not leave the statute open to different construction. It would be an anomaly for this court to put one interpretation on a statute in a case arising in New York and a different interpretation in a case arising in Florida."

Justice Woods in *Flash vs. Conn.*, 109 U. S. 371.

Corporate necessity recognizes the controlling effect of the law of the home state of the corporation.

Royal Arcanum vs. Green, 237 U. S. 531.

The provisions of the Constitution and of the Act of Congress by which the judgments of one state are to have faith and credit given them in another state establishes a rule of evidence rather than of jurisdiction.

The Supreme Court of Illinois in the case of *Steen vs. Modern Woodmen of America*, 296 Ill. 104, reached the conclusion that by-law No. 66 was valid and it was well within the powers of the corporation to enact such a by-law. The question before the court in this case is the same as that involved in the Steen case, being an interpretation of the powers of the corporation. If the court failed to give due credit to the judgment entered in the Steen case on the question of the power of the society to enact a by-law then the court would fail to give full faith and credit to the acts and judgment of the courts of Illinois, and this would involve a rule of evidence.

"The provisions of the constitution and of the act of congress by which the judgments of one state are to have faith and credit given to them in another state establishes a rule of evidence rather than of jurisdiction. They do not affect the jurisdiction of the court in which the judgment is rendered but that in which it is offered in evidence."

Wisconsin vs. Pelican Ins. Co., 127 U. S. 265.

There is no vested right in a rule of evidence, and parties may by contract change an established rule of evidence and provide that a different rule shall apply in determining controversies that may arise between parties to the contract.

The courts generally have recognized that parties may contract to change the established rules of evidence and provide that a different rule may obtain.

In the case of *Moudou vs. N. Y., N. H. & Hartford R. R. Co.*, 223 U. S. 1, the court said:

"Congress did not exceed its power to regulate the relations of interstate railway carriers and their employees engaged in interstate commerce, by enacting the Employers' Liability Act of April 22, 1908, which abrogates the fellow servant rule, extends the carrier's liability to cases of death, and restricts the defenses of contributory negligence and assumption of risk, since no one has any vested right under any rule of the common law, and the natural tendency of such changes is to promote the safety of the employees and to advance the commerce in which they are engaged."

In the case of *Mobile, Jackson & P. C. R. R. Co. vs. Turnispeed*, 219 U. S. 35, the court said:

"Neither the equal protection of the laws nor due process of law is denied by the Mississippi code 1916, Section 1985, under which an action against railway companies for damage done to persons or property, proof of injury inflicted by the running of the locomotive or cars is made prima facie evidence of negligence."

In discussing the question in the case last above cited, the court said:

> "Legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue, is but to enact a rule of evidence and quite within the general power of government. Statutes, national and state, dealing with such methods of proof in both criminal and civil cases, abound, and decisions upholding them are numerous."

In the case of *Roeh vs. Business Men's Protective Association of Des Moines,* 164 Ia. 199, a provision of a certificate of a mutual assessment society provided that the society should not be liable for any injury or death caused by the discharge of a firearm unless the accidental character thereof be established by the testimony of one eye witness other than the member. The court, in relation to the validity of this provision, said:

> "It was to remove the presumption of accident and although not necessarily requred that the witness should have seen the exact manner of the discharge, it did require his presence at or near the scene and his direct observation of such facts and circumstances connected with the immediate transaction as of themselves would indicate that the shooting was accidental."

And in discussing further inrelation to the validity of this proposition, the court said:

> "A provision in a benefit certificate of a mutual benefit association providing that the association shall not be liable for death caused by the discharge of a firearm unless the accidental character thereof be established by one witness other than insured, is not contrary to public policy in that it attempts to modify and control the procedure of courts of justice."

In the body of the opinion of the case last above cited, as to the validity of this by-law, the court said:

> "It is contended that the by-law is contrary to public policy, in that it attempts to modify and control

the procedure of courts of justice. It does not in any manner deprive courts of their jurisdiction, but simply provides a rule of evidence or a condition precedent or subsequent to a right of recovery. We see nothing in the by-law contrary to public policy. Contracts relating to procedure have frequently been sustained. The parties may, by contract, fix their own statute of limitations. See *Harrison vs. Insurance Co.*, 102 Ia. 112 (71 N W. 229; 47 L. R. A. 709). They may also specify the terms and conditions of liability, even though, without the contract, recovery might be had. *Griswold vs. Railroad*, 90 Ia. 265; 57 N. W. 843; 24 L. R. A. 647. A contract may be made waiving a jury trial; *Columbia Bank vs. Okely*, 4 Wheat. 235; 4 L. Ed. 559. A by-law much like the one now before us was applied in *National Ass'n. vs. Ralstin*, 101 Ill. App. 192; *Kelly vs. Supreme Council*, 46 App. Div. 79; 61 N. Y. Sup. 394. A contract providing a rule of evidence was also upheld by this court in *Russ vs. The War Eagle*, 14 Ia. 363. The legislature has not spoken upon this subject and until it does so, we see nothing inimical to public policy in the by-law now before us.

"The rule of evidence established by this by-law is for the mutual benefit of all the million members of this society. The insured had the benefit of this agreement as well as all other members, and his beneficiaries must share its burdens. Parties have a right to agree as to what proof of death shall be furnished before the policy is payable. Appellee, as a legal entity, has no interest in this matter apart from its membership because it is a society organized not for profit."

Steen vs. Modern Woodmen of America, 296 Ill. 104.

If the legislature has not limited the charter powers of foreign beneficiary societies, the charter as interpreted by the courts of the home state is controlling.

In he cases of *Thomas vs. Matthiessen*, 232 U. S. 221; *National Mutual Building & Loan Association vs. Brahan*, 193 U. S. 635, and *New York Life Insurance Co. vs. Cravens*, 178 U. S. 389, the statutes of the domiciliary state were rendered nugatory by contrary legislation in the states in which

the corporations were transacting business, it being held that the corporations might be deemed to have accepted the contrary legislation by coming into the state.

The legislature of Nebraska has enacted no laws invalidating the provisions set forth in By-Law 66; that is, the legislature has not enacted any law which makes invalid a contract relating to a rule of evidence.

In the cases of *Dworak vs. Supreme Lodge*, 101 Neb. 297; *Dolan vs. Supreme Council*, 152 Mich. 266; *Weiditschka vs. Maccabees*, 188 Ia. 183, and *Dennis vs. Modern Brotherhood of America*, 119 Mo. App. 209, conflicting statutes between the domiciliary state of the beneficiary society and the state where doing business were involved, and in each case the court reached the conclusion that the statutes of the state where the societies were doing business controlled rather than the domiciliary states of the societies.

If the legislature of Nebraska had not enacted a statute which provided those only who could take as beneficiaries, then in the Dworak case, *supra*, the statutes of Iowa would control, but inasmuch as the legislature of Nebraska provided the class of beneficiaries only who could take it nullified the statute law of Iowa which provided who could be beneficiaries.

In the cases of *McElroy vs. Insurance Co.*, 84 Neb. 866, and *Rye vs. New York Life Insurance Co.*, 88 Neb. 707, the insurance companies contended that the policies of insurance had been forfeited on account of the failure to pay premiums. The plaintiffs contended that there were no forfeitures because no notices had been served that forfeitures would be declared in conformity with the statute of New York. The question then arose as to whether the statute of New York was controlling in Nebraska. The Nebraska court reached the conclusion that the New York statute was not controlling for the reason that it did not have any extra-

territorial application, it being confined to the policy-holders residing within the state of New York. The natural inference is that the New York statute would have controlled if it applied to all policy-holders alike.

Similar questions were decided in the case of *Mutual Life Insurance Co. vs. Cohen,* 179 U. S. 262, and related to the New York statute. The same question was disposed of in the case of *Mutual Life Insurance Co. vs. Hill,* 193 U. S. 551. The Supreme Court of the United States in the two cases above mentioned, reached the conclusion that the statute of New York did not have any extraterritorial application, that it only applied to policy-holders within that state. Justice Brewer, in the Cohen case, in discussing this question, said:

> "These considerations led to the conclusion that the statute of New York, directed as it is to companies doing business within the state, was intended to be, and is in effect, applicable only to business transacted within that state."

Justice Brewer, discussing another phase of the same question in the Cohen case, said:

> "Further, it may be noticed that even if the language justifies a broader construction it may well mean that only such laws of the state of New York as are intended to and do change the charters of the companies, or are intended to have extraterritorial application, should be considered a part of the policy."

In this case all by-laws adopted by petitioner enter into and become a part of the contract between petitioner and its members. The by-laws affect the members wherever situated and the very nature of the corporation impels the conclusion that its power to enact by-laws must be lodged in its charter, based upon the statute under which the corporation is incorporated. If petitioner had the power under its charter and the statutes of Illinois to enact By-law 66

then the District Court of Dakota County, by sustaining the demurrer to petitioner's answer, and the Supreme Court of Nebraska by affirming this judgment, fail to give full faith and credit to the decision and judgment of the Supreme Court of Illinois in the case of *Steen vs. Modern Woodmen of America.*

For the foregoing reasons we respectfully submit that the petition for a Writ of Certiorari should be granted.

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Supreme Court of the United States

October Term, 1924

No. 308

MODERN WOODMEN OF AMERICA,
Petitioner,

vs.

JENNIE VIDA MIXER,

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF FOR PETITIONER

This cause comes to this court on writ of certiorari to the Supreme Court of the State of Nebraska to review a final judgment rendered on the 31st day of December, 1923 (Rec., p. 59), which affirmed the judgment of the District Court of Dakota County, Nebraska, entered on the 10th day of January, 1922 (Rec., p. 35). A motion for rehearing filed January 23, 1924 (Rec., p. 59), was on the 2nd day of February, 1924, overruled (Rec., p. 61). A demurrer was filed by respondent in the trial court to the first division of the answer filed by petitioner, alleging that the answer did not state facts sufficient in law to constitute a defense (Rec., p. 34). The questions at issue are contained in the

first division of petitioner's answer (Rec., pp. 12-21). The demurrer being sustained by the trial court the facts alleged in the answer, for the purpose of errors assigned, are conclusively established and set forth in statement following (Rec., p. 35).

STATEMENT

1. The petitioner, Modern Woodmen of America, is a fraternal beneficiary corporation organized under the laws of Illinois, and was and is organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit, having a lodge system with ritualistic form of work and representative form of government, and makes provisions for the payment of benefits to the beneficiaries of deceased members subject to compliance by its members with its constitution and laws (Rec., p. 12).

2. The petitioner for more than twenty-five years last past has been duly admitted to transact business in Nebraska as a fraternal beneficiary society, and in its entire jurisdiction has more than a million members to whom benefit certificates have been issued (Rec., pp. 13, 30).

3. On the 18th day of November, 1901, Walter Crocker Mixer became a member of a subordinate body of the petitioner at Elk Point, South Dakota (Rec., p. 5), pursuant to a written application for membership, and received a benefit certificate in favor of the respondent, his wife, in the sum of Two Thousand Dollars ($2,000) (Rec., p. 1), which was delivered to him at said location, and for the purposes of this action it is the same as though delivered in Nebraska, as the laws of South Dakota will be presumed to be the same as the laws of Nebraska (Rec., p. 5).

4. The petitioner's by-laws, duly and regularly enacted and in full force and effect at all times from and after the first day of September, 1908, among other provisions, provide as follows:

"Sec. 66. DISAPPEARANCE NO PRESUMPTION OF DEATH. No lapse of time or absence or disappearance on the part of any member, heretofore or hereafter admitted into the Society, without proof of the actual death of such member, while in good standing in the Society, shall entitle his beneficiary to recover the amount of his benefit certificate except as hereinafter provided. The disappearance or long continued absence of any member unheard of, shall not be regarded as evidence of death or give any right to recover on any benefit certificate heretofore or hereafter issued by the Society until the full term of the member's expectancy of life, according to the National Fraternal Congress Table of Mortality has expired within the life of the benefit certificate in question, and this law shall be in full force and effect, any statute of any state or country or rule of common law of any state or country to the contrary notwithstanding. The term 'within the life of the Benefit certificate,' as here used, means that the Benefit certificate has not lapsed or been forfeited, and that all payments required by the by-laws of the Society have been made" (Rec., p. 17).

5. The respondent began this action in the District Court of Dakota County, Nebraska, on the 7th day of October, 1921, alleging in her complaint that the petitioner issued to her husband, Walter Crocker Mixer, a Benefit certificate in the sum of Two Thousand Dollars ($2,000), dated November 18, 1901, and that the petitioner promised to pay to respondent, as beneficiary, on the death of her husband the sum of $2,000; and that her husband, Walter Crocker Mixer, had been absent from his home and place of residence for over seven years last past, and that his absence had been continuous and unexplained, and that by reason of his absence he was presumed to be dead (Rec., p. 1).

6. The petitioner duly filed its answer, which will be found on pages 12 to 21, both inclusive, of record, and sets out the law relating to fraternal beneficiary societies enacted and in force in the State of Illinois, which law is found on pages 12 and 13 of record, and sets out a copy

of the application for membership of Mixer, which application is set out in full on pages 5, 6, 7, 8, 9 and 10 of record. The answer also sets out a copy of the Benefit certificate issued to Mixer, and may be found on pages 2, 3 and 4 of record. By-law 66 is also set out. The answer also sets forth that the cause of action set forth in respondent's petition is based on a contract made and entered into between Walter Crocker Mixer and this petitioner, and the said contract is composed of the charter or articles of association of Modern Woodmen of America, the statute of the State of Illinois, the by-laws, rules and usages of the society in force at the time the said Mixer became a member, together with all by-laws, rules and usages thereafter enacted by this petitioner, the application for membership and the benefit certificate issued to Mixer, and the one upon which the action is based. Petitioner also alleged in its answer that under the charter granted by the State of Illinois, and under the laws of that state it had authority to adopt, alter, revise and amend its by-laws, and that ever since the organization and incorporation of the petitioner it was and still is the statute law of the State of Illinois that fraternal beneficiary societies, of which petitioner, Modern Woodmen of America, is one, may revise, alter and amend their by-laws, and that under and by virtue of the laws of the State of Illinois, as determined by its courts of competent jurisdiction, fraternal beneficiary societies, of which petitioner is one, have power to revise, amend and alter their by-laws, and that said revised and amended by-laws are binding on the members thereof and their beneficiaries; that the corporate power of the Modern Woodmen of America and respondent's rights, as well as the rights of any beneficiary depending upon the membership of Walter Crocker Mixer in petitioner, are determined by the acts of the State of Illinois, which authorize petitioner to alter, revise and amend its by-laws, and members of the petitioner (including said Walter Crocker Mixer), and their beneficiaries are bound thereby; that under the statute law of the State of Illinois as the same existed at all the

times herein mentioned, this petitioner had the right and power to enact by-laws, and said by-laws so enacted became a valid and existing part of the contracts between the society and its members, and that the said Section 66 of petitioner's by-laws, so enacted as aforesaid, was and is a valid and existing part of the contract between the petitioner and Walter Crocker Mixer, and binding upon the beneficiaries under his certificate. The answer also sets out that petitioner was a fraternal beneficiary society incorporated under the laws of Illinois and authorized to do business in Nebraska, and was carried on for the sole benefit of its members and their beneficiaries and not for profit, having a lodge system with ritualistic form of work and representative form of government, and made provision for payment of benefits subject to compliance by its members with its constitution and laws, and alleged that its by-laws, duly and regularly enacted and in full force and effect at all times from and after the first day of September, 1908, included By-law No. 66 set out on page 3 herein. And the by-law heretofore set out was expressly authorized by and adopted pursuant to the terms of the contract between the parties, which included the statutes of Illinois, the charter, by-laws, application for membership and Benefit certificate.

7. The answer of petitioner then sets forth certain judicial proceedings had in the courts of the State of Illinois as a basis for the plea which follows that such proceedings, involving as they do a construction by the courts of Illinois of the power of petitioner under its articles of incorporation to enact the identical by-law in question in this case, are binding on the courts of Nebraska as to such construction under the full faith and credit doctrine found in Section 1, Article 4, of the Constitution of the United States. Such judicial proceedings are stated thus: On the 13th day of December, 1917, one Louisa W. Steen filed an action at law against this petitioner in the Superior Court of Cook County, Illinois, and in her declaration for cause of action, alleged that on the 15th day of January,

1897, this petitioner issued a certain benefit certificate to one Albert F. Steen, payable on his death in the sum of $2,000 to Louisa W. Steen, his wife, as beneficiary. That on the 7th day of May, 1910, said Albert F. Steen disappeared from his home in the city of Chicago, Illinois, and his absence had continued seven years, and was presumed to be dead, and the said Louisa W. Steen prayed judgment for the sum of $2,000. The petitioner herein, defendant therein, on January 9, 1918, filed a special plea to plaintiff's declaration, alleging that it was a fraternal beneficiary society, that the suit was founded on the contract entered into between Albert F. Steen and the petitioner, which consisted of the application for membership, the Benefit Certificate, the by-laws, rules and usages of the Society then in force or thereafter enacted, and admitted that the Benefit certificate had been issued to Albert F. Steen for the sum of $2,000; and the plea further alleges that the by-laws of petitioner in force when said Benefit certificate was issued were subsequently amended and modified, and from and after September 1, 1908, the by-laws contained Section 66, as set forth on page 3 herein; and the plea concluded with the allegation that proof of the actual death of Albert F. Steen had never been furnished to the petitioner, and the expectancy of life of Albert F. Steen, according to the National Fraternal Congress Table of Mortality, had not expired.

8. On the 7th day of February, Louisa W. Steen filed a demurrer to petitioner's said plea, alleging that said plea was not sufficient in law to constitute a defense to her action, and thereafter, on the first day of June, 1918, the Superior Court of Cook County, Illinois, entered an order overruling the demurrer to the special plea, holding that said by-law was valid and that Louisa W. Steen could not maintain her action. Louisa W. Steen refused to plead further and elected to stand on her demurrer to the special plea. The action was appealed to the Appellate Court of the First District of Illinois, which court, on the third day

of April, 1920, entered an order and judgment affirming the judgment of the Superior Court of Cook County, Illinois. Louisa W. Steen prefected her appeal in the Supreme Court of Illinois, which is the highest judicial tribunal of Illinois, and on the 20th day of December, 1920, the Supreme Court of Illinois filed an opinion in the case of *Louisa W. Steen vs. Modern Woodmen of America*, 296 Ill. Rep. 104, a full copy of which opinion was made a part of the answer and is found in the record, page 24, whereby the Supreme Court of Illinois affirmed the judgment of the Appellate Court of the First District of Illinois, and held that By-law 66 is a valid by-law and a valid and existing part of the contract and binding upon the members of this petitioner and their beneficiaries. Thereafter a petition for rehearing was filed in the Supreme Court of Illinois, which petition for rehearing was overruled on February 3, 1921. The opinion thereupon became final and judgment was thereupon entered in the Supreme Court of Illinois affirming the judgment in favor of this petitioner (Opinion Supreme Court Rec., pp. 24-33).

9. The answer in this case further alleged that the constitution and by-laws of this petitioner and the contract rights between this petitioner and its members, and the authority and power of this petitioner under its charter and the statute law of Illinois, as passed upon by the Superior Court of Cook County, Appellate and Supreme Courts of Illinois, in the case of Steen against the petitioner, are the same as in this case; that the question involved in this case is whether petitioner had the power to enact Section 66 of petitioner's by-laws, and is a valid by-law and binding upon the members of the corporation and their beneficiaries, and this is the same question which was determined by the Superior Court of Cook County, Appellate and Supreme Courts of Illinois, in the Steen case aforesaid. The answer alleged petitioner's by-laws were filed with the proper authorities in the State of Nebraska, and that the expectancy of life of the said Mixer, according

to the National Fraternal Congress Table of Mortality, had not expired at the time of the commencement of this suit and had not expired, and did not expire within the life of the Benefit certificate sued upon and that proof of the actual death of said Mixer had never been furnished to or filed with petitioner (Rec., pp. 12-21). The said answer further alleged that the validity of Section 66, set out above, was concluded by the aforesaid judgment of the Superior Court of Cook County, Appellate and Supreme Courts of Illinois, and that under Section 1, Article 4 of the Constitution of the United States it was the duty of the trial court to give full faith and credit to the statute law of Illinois, and the judgment of the Superior Court of Cook County, Appellate and Supreme Courts aforementioned in the case of *Steen vs. Modern Woodmen of America* (Rec., pp. 12-21).

10. The respondent filed a demurrer to the answer of petitioner, alleging that the said answer was not sufficient in law to constitute a defense. The demurrer was by the District Court of Dakota County, Nebraska, sustained, to which the petitioner at the time duly excepted. The filing of the demurrer admits all the facts pleaded in the answer. The petitioner refused to plead further and the defense set forth in petitioner's answer was dismissed, to which ruling of the court the petitioner at the time excepted. The trial court entered judgment for the amount claimed in respondent's petition (Rec., p. 35). An appeal was taken to the Supreme Court of Nebraska and the judgment of the District Court was affirmed. The Supreme Court filed no opinion other than to say that it based its ruling upon the cases of *Garrison vs. Modern Woodmen of America,* 105 Neb. 25; *Coverdale vs. Royal Arcanum,* 193 Ill. 91, and *Boynton vs. Modern Woodmen of America,* 148 Minn. 150 (Rec., p. 59). The Supreme Court of Nebraska omitted in its opinion any mention of the binding force of the judgment of the Supreme Court of Illinois in the case of *Steen vs. Modern Woodmen of America,* 296 Ill. 104, and its interpre-

tation of the powers of petitioner under its charter (Rec., p. 59).

11. The Constitution and By-laws of this petitioner, and the contract rights between this petitioner and its members, and authority and power of this petitioner under its charter and the statute law of the State of Illinois, as passed upon by the Superior, Appellate and Supreme Courts of the State of Illinois in the Steen case, are the same as in this case; that the question involved in this case is whether the by-law in question is a valid by-law and binding upon the members of the Society and their beneficiaries, and its enactment within the power of petitioner under its charter granted by the State of Illinois, and this was the identical question which was determined by the courts of Illinois in the Steen case.

12. The petitioner having been organized and chartered under the laws of Illinois it follows that on all matters which relate to its power to do a given act, such as the adoption of the by-law hereinbefore set out, is to be determined by the courts of that state, the domicile of the corporation. Wherever a corporation goes to transact business it carries with it its charter and the interpretation of the power of that charter by the courts of the state where the corporation is organized. The District Court of Dakota County and the Supreme Court of Nebraska failed to give full faith and credit to the judgment in the case of *Steen vs. Modern Woodmen of America, supra,* by not following the conclusion reached in that case as to the power of petitioner under its charter and the statute of Illinois.

13. If the judgment rendered in the case of *Steen vs. Modern Woodmen of America* by the Supreme Court of Illinois is not controlling as to the power of the corporation to enact By-law 66 relating to disappearance of members, then the funds of the Society would be distributed by one rule in Illinois and by another rule in Nebraska. Mr. Chief Justice White, in the case of *Royal Arcanum vs. Green,* 237

U. S. 531, said in substance that a fund which was distributed by one rule in one state and by a different rule somewhere else would, in effect, amount to no distribution.

14. The legislature of Nebraska has not deemed it advisable to limit the charter powers of foreign fraternal beneficiary societies by providing that such fraternal beneficiary societies may not enact such a by-law nor contract in reference to a rule of evidence. Until the legislature makes invalid the right of a fraternal beneficiary society so to do, the power of petitioner, as set forth in its charter, and interpreted by the courts of Illinois, is unimpeached and paramount, and the failure of the District Court of Dakota County and of the Supreme Court of Nebraska to recognize the controlling effect of the judgment rendered by the Supreme Court of Illinois in the case of *Steen vs. Modern Woodmen of America* was the failure of the courts to give full faith and credit to the public acts, records and judicial proceedings of Illinois, and to the judgments and decisions of the highest tribunal of Illinois, the place of petitioner's incorporation and domicile, in construing the validity of By-law 66, and this is a violation of Section 1, Article 4 of the Constitution of the United States.

15. The writ of certiorari was granted the petitioner on April 28,, 1924 (Rec., p. 64).

SPECIFICATION OF ERRORS

The petitioner assigns the following errors of the Supreme Court of Nebraska:

1. The Court erred in failing to find and decide that the trial court erred in sustaining the demurrer of respondent to the first division of the affirmative ground of defense of petitioner's answer, and thereby failed to give full faith and credit to the judgment of the Supreme Court of Illinois in the case of *Steen vs. Modern Woodmen of America*, as pleaded, as required to be done by the Constitution of the United States and the statutes thereof.

2. The Court erred in not holding that the full faith and credit clause of the Constitution, Section 1, Article 4, and the statutes of the United States enacted pursuant thereto was violated by the refusal of the trial court to hold that the petitioner, a mutual benefit society, under its charter had the power to enact the by-law in question.

3. The Court erred in not recognizing the controlling effect of the Illinois law as established by the judgment in the case of Steen against the petitioner, although this decision and judgment were duly pleaded and presented by the record.

4. The Court erred in holding and deciding that the trial court did not err in holding that petitioner did not have the power to contract with reference to a rule of evidence when the question of power had already been determined by the Supreme Court of Illinois, the home state of the corporation, in a judgment rendered on the 21st day of December, 1921, in the case of *Steen vs. Modern Woodmen of America,* this judgment having been duly pleaded and presented to the court by the petitioner.

5. The Court erred in sustaining and affirming the judgment of the trial court in refusing to apply the laws of the State of Illinois, the domicile of the petitioner corporation, as proved and established by the first division of the affirmative ground of defense in petitioner's answer, and demurred to by respondent for the purpose of determining the corporate power of the corporation and the rights and liabilities under the contract of membership, as set forth in the answer of petitioner, and the facts therein alleged duly admitted by the demurrer filed by respondent, as required by the Federal Constitution and statutes.

6. The Court erred in affirming the trial court in holding that the first division of petitioner's first affirmative ground of defense of its answer did not state facts sufficient

in law to constitute a defense to respondent's cause of action set forth in her petition.

ABRIDGMENT OF SPECIFICATION OF ERRORS

The foregoing assignment of errors, broadly speaking, presents but one general ground of objection to the judgment under review.

The judgment of the Supreme Court of Nebraska affirming the judgment of the trial court denied full faith and credit to the public acts of Illinois and the judgment entered in the case of Steen against petitioner, 296 Ill. 104, which held that the petitioner had the power under its charter and the public acts of Illinois, the domicile of the petitioner corporation, to enact the by-law in question, found on page 17 of record, and thereby violated Section 1, Article 4, of the Constitution of the United States.

ARGUMENT

The Supreme Court of Nebraska decided this case without writing an extended opinion, and based its conclusion solely upon the doctrine announced in the cases of *Garrison vs. Modern Woodmen of America*, 105 Neb. 25; *Coverdale vs. Royal Arcanum*, 193 Ill. 91, and *Boynton vs. Modern Woodmen of America*, 148 Minn. 150, upon the assumption that there was no distinction between these cases and the instant case. The conclusion was reached in the *Garrison case, supra*, on the grounds that the society did not have the power to enact such by-law, and that such by-law was an unreasonable invasion of the rights of the member, and consequently did not prevent the beneficiary from recovering. The *Boynton case, supra*, decided by the Supreme Court of Minnesota, was on exactly the same issue as the one decided in the *Garrison case*. In the *Coverdale case, supra*, the question involved was one of forfeiture and did not involve the question raised in this case. In none of these cases was a federal question involved.

The real question is, did petitioner have the power under its charter, granted by Illinois and the statutes of Illinois, to enact the by-law in question and thereby contract with reference to a rule of evidence, as set forth in this by-law? When the petitioner came into Nebraska to transact business as a fraternal beneficiary society it brought its charter with it, and its power to do any given thing is to be determined by that charter and the interpretation of it by the courts of Illinois. If the petitioner had the power to enact this by-law under its charter as interpreted by the courts of Illinois, the domicile of the corporation, then the courts of Nebraska were bound to recognize this power and the validity of this by-law as interpreted by the courts of Illinois. The District Court of Dakota County, sustaining the demurrer filed by respondent to the answer of petitioner, and the Supreme Court of Nebraska affirming the decision of the District Court, failed to give full faith and credit to the decision and judgment of the courts of Illinois in the case of *Steen vs. Modern Woodmen of America,* 296 Ill. 104.

The by-law as enacted by the petitioner is valid under the interpretation of the Courts of Illinois. The question then arises, does this particular by-law, which applies to every member of the corporation and gives no advantage to one over another, and the power to enact it as interpreted by the courts of the home state of the corporation, follow the corporation, in the transaction of business as a fraternal beneficiary society, into other states?

The respondent by interposing a demurrer admitted all the allegations contained in petitioner's answer.

The petitioner elected to stand on its answer, to which the demurrer interposed by respondent was sustained and did not plead further. A general demurrer to a pleading admits all of the facts alleged and the parties so demurring must abide by the consequences which will result from such admissions.

McArthur vs. Clarke Drug Co., 48 Neb. 899.

In discussing the effect of a general demurrer to a pleading, the court, in the case of *Daily vs. Railroad*, 58 Neb. 396, said:

> "A pleading must be said to allege what can by reasonable and fair intendment be implied from its statements, and when assailed by general demurrer all it states is to be considered as admitted, and unless, when viewed in the light of the foregoing rule, there is no cause of action stated the pleading must be upheld."

The condition of the record resulting from the demurrer to the answer filed and judgment of the court thereon, is the same as if a duly authenticated copy of the record of the judgment entered in the case of *Steen vs. Modern Woodmen of America, supra*, had been offered in evidence and by the court rejected.

Where either the application or benefit certificate contain an agreement on behalf of the member to be bound by after-enacted by-laws, said after-enacted by-laws are valid and the member is bound thereby.

The application made by the member, Mixer, as shown on page 5 of record, and the Benefit certificate on page 2 of record, provide that the laws, rules and usages of the society then in force, or which might thereafter be enacted, are part of the contract between the member and the society. The contract, therefore, provided that the member, Mixer, should be bound by all the laws that were legally enacted by the petitioner subsequent to the time of the issuance of his Benefit certificate.

Hall vs. Association, 69 Neb. 601.
Funk vs. Stevens, 102 Neb. 681.
Supreme Lodge Knights of Pythias vs. Mims, 241 U. S. 574.
Apitz vs. Supreme Lodge, 274 Ill. 196.
Steen vs. Modern Woodmen of America, 296 Ill. 104.
Thomas vs. Knights of Maccabees, 85 Wash. 665.
Hollingsworth vs. Supreme Council, 175 N. C. 615.
Reynolds vs. Supreme Council, 192 Mass. 150.

Case vs. Supreme Tribe, 106 Neb. 220.
Supreme Lodge vs. Smyth, 245 U. S. 594.
Langnecker vs. Grand Lodge, 111 Wis. 279.
Norton vs. Catholic Order of Foresters, 138 Ia. 464.
Korn vs. Mutual Assurance Society, 6 Cranch 192.
Crites vs. Modern Woodmen of America, 82 Neb. 298.
Hartford Life Insurance Co. vs. Ibs, 237 U. S. 662.
Supreme Council vs. Green, 237 U. S. 531.
Hartford Life Insurance Co. vs. Barber, 245 U. S. 146.

The Supreme Court of Illinois in the *Apitz case, supra*, in discussing the validity of an after-enacted by-law which related to suspending a member who had been absent and unheard of for a given period (p. 199) said:

> "Where the contract between the member and the society reserves the right to the society to amend or change the by-laws, and the member agrees to be bound thereby, and accepts the certificate under those conditions, subsequently enacted by-laws are binding upon him."

In the case of *Steen vs. Modern Woodmen of America*, supra, the court reached the conclusion that the by-law involved in this case was binding upon the member, although it was enacted after the certificate of membership had been issued.

In the case of *Norton vs. Catholic Order of Foresters, supra*, the court, in discussing the power of a society to pass an after-amended by-law relating to a prohibited occupation, p. 466, said:

> "It is settled by our own cases that a contract whereby the insured agrees to be bound by the constitution and by-laws then in force or which may thereafter be enacted, is valid and binding. * * * It is also the rule in this state that the members of a mutual association are bound to take notice of and be governed by the by-laws of such association and that where the contract of insurance makes by-laws adopted after the contract is made, a part thereof, the insured is bound to take notice of them and be governed thereby."

In the case of *Supreme Lodge vs. Mims*, 241 U .S. 574, the validity of a certain by-law which had been passed by the association was before the court. The member had agreed to abide by the by-laws of the society when he became a member, and those thereafter enacted, and the court reached the conclusion that the by-law was valid. The court was of the opinion that the society, having a representative form of government, and the legislative body of the society having determined that it was to the interest of the society to enact such by-law, the member was bound thereby. The court refers to the society as a republic and a member belonging to such an institution could not question laws which were enacted by the proper authorities of the association.

What are the documents which constitute the contract between a fraternal beneficiary association and its membership?

The statutes of the state where society incorporated, charter or articles of association, Benefit certificate and laws of the society enter in and are parts of the contract of membership between a fraternal beneficiary society and its membership.

Baldwin vs. Begley, 185 Ill. 180, p. 187.
Fulenweider vs. Royal League, 180 Ill. 621, p. 625.
Sabin vs. Phinney, 134 N. Y. 423, p. 428.
Shipman vs. Protected Home Circle, 174 N. Y. 398, p. 409.
Union Mutual Association vs. Montgomery, 70 Mich. 587, p. 594.
Supreme Lodge vs. LaMalta, 95 Tenn. 157.
Gaines vs. Supreme Council, 140 Fed. 978, p. 979.
Van Schoonhoven vs. Curley, 86 N. Y. 187, p. 192.
Sharpe vs. Grand Lodge, 108 Neb. 193.
Farmers vs. Kinney, 64 Neb. 808, p. 810.
Relfe vs. Rundle, 103 U. S. 222.
Kirkpatrick vs. Modern Woodmen of America, 103 Ill. App. 468, p. 473.

In *Baldwin vs. Begley, supra,* the Illinois Supreme Court said, p. 187:

> "Undoubtedly the contract between the benefit society and its members is contained in the certificate, taken in connection with the constitution and by-laws of the order and the statute of the state under which it is formed."

In *Sabin vs. Phinney, supra,* the Court of Appeals of New York, speaking of a similar society, said, p. 428:

> "The statute under which the corporation was organized, its by-laws, together with the application for, and the certificate of membership, constituted the contract which existed between the member and the society, which instruments, construed together, measure the rights of these litigants."

In *Shipman vs. Protected Home Circle, supra,* the Court of Appeals of New York said, p. 409, quoting from Bacon in his work on benefit societies (Sec. 321):

> "The chief difference between ordinary contracts of life insurance companies and those used by benefit societies is that in the former the policy and documents referred to in it, contain the agreement, while in the latter the certificate, together with the charter and by-laws are to be looked to for the contract."

In *Kirkpatrick vs. Modern Woodmen of America, supra,* the Appellate Court said, p. 473:

> "The constitution and by-laws of the society, and the statutes of the state must be construed with reference not only to the terms of the certificate, but to the status of the parties existing at the date of death."

In the case of *Sharpe vs. Grand Lodge, supra,* the court, p. 197, said:

> "The provisions of the statute of the state under which a fraternal beneficiary association or mutual

insurance company is organized, become and are a controlling part of the contract between it and its members."

In the case of *Farmers Mutual Ins. Co. vs. Kinney, supra*, the court, p. 810, said:

> "The statute, together with the articles of incorporation and the by-laws of defendant company, and the written application made by the plaintiff, and the certificate of membership issued to him, constitute the contract between the plaintiff and defendant."

In the case of *Gaines vs. Supreme Council, supra*, the court, p. 979, said:

> "The contract is, of course, found not only in the certificate of membership, but in the properly adopted by-laws and regulations or the laws of Massachusetts, under which the association is incorporated, and it is obvious enough that the law of Massachusetts furnishes the rule for the decision of the question now up for disposition, and all similar questions relating to this association and its powers and authority."

The provisions of the Constitution and of the Act of Congress by which the judgments of one state are to have faith and credit given them in another state establishes a rule of evidence rather than of jurisdiction.

The Supreme Court of Illinois in the case of *Steen vs. Modern Woodmen of America, supra*, reached the conclusion that By-law No. 66 was valid and it was well within the powers of the corporation to enact such a by-law. The question before the court in this case is the same as that involved in the *Steen case*, being an interpretation of the powers of the corporation. If the court failed to give due credit to the judgment entered in the Steen case on the question of the power of the society to enact a by-law, then the court would fail to give full faith and credit to the public acts and judgments of the courts of Illinois, and this would involve a rule of evidence.

The provisions of the constitution and of the act of Congress by which the judgments of one state are to have faith and credit given to them in another state establishes a rule of evidence rather than of jurisdiction. They do not affect the jurisdiction of the court in which the judgment is rendered, or of that in which it is offered in evidence.

Wisconsin vs. Pelican Ins. Co., 127 U. S. 265, pp. 291-292.

In the *Steen case, supra*, the court, p. 113, said:

"The contract in question here is insurance on life and the one essential fact necessary to mature this contract is the death of the insured. The burden is on the beneficiary to prove this death. The rule of law which appellant invokes is a rule of evidence and relates to the manner and quantum of proof necessary to establish death."

Harrison vs. Insurance Co., 102 Ia. 112.
Russ vs. War Eagle, 14 Ia. 363.
Kelly vs. Supreme Council, 46 App. Div. 79.
Mobile, Jackson & P. C. R. R. Co. vs. Turnispeed, 219 U. S. 35.

There is no vested right in a rule of evidence, and parties may by contract change an established rule of evidence and provide that a different rule shall apply in determining controversies that may arise between parties to the contract.

The courts generally have recognized that parties may contract to change the established rules of evidence and provide that a different rule may obtain.

Congress did not exceed its power to regulate the relations of interstate railway carriers and their employes engaged in interstatee commerce by enacting the Employers' Liability Act of April 22, 1908, which abrogates the fellow servant rule, extends the carrier's liability to cases of death, and restricts the defenses of contributory negligence

and assumption of risk, since no one has any vested right in any rule of the common law, and the natural tendency of such changes is to promote the safety of the employes and to advance the commerce in which they are engaged.

> *Mondou vs. N. Y., N. H. & Hartford R. R. Co.*, 223 U. S. 1, p. 50.

Neither the equal protection of the laws nor due process of law is denied by the Mississippi code 1916, Section 1985, under which an action against railway companies for damage done to persons or property, proof of injury inflicted by the running of the locomotive or cars is made *prima facie* evidence of negligence.

> *Mobile, Jackson & P. C. R. R. Co. vs. Turnispeed*, 219 U. S. 35, p. 42.

In discussing the question in the case last above cited, the court said, p. 42:

> "Legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue, is but to enact a rule of evidence and quite within the general power of government. Statutes, national and state, dealing with such methods of proof in both criminal and civil cases, abound, and the decisions upholding them are numerous."

In the case of *Roch vs. Business Men's Protective Association of Des Moines*, 164 Ia. 199, a provision of a certificate of a mutual assessment society provided that the society should not be liable for an injury or death caused by the discharge of a fireman unless the accidental character thereof be established by the testimony of one eye witness other than the member. The court held this provision valid.

In the body of the opinion of the case last above cited, as to the validity of this by-law, the court, p. 207, said:

> "It is contended that the by-law is contrary to public policy, in that it attempts to modify and control the procedure of courts of justice. It does not in any

manner deprive courts of their jurisdiction, but simply provides a rule of evidence or a condition precedent or subsequent to a right of recovery. We see nothing in the by-law contrary to public policy. Contracts relating to procedure have frequently been sustained. The parties may, by contract, fix their own statute of limitations. See *Harrison vs. Insurance Co.*, 102 Ia. 112. They may also specify the terms and conditions of liability, even though, without the contract, recovery might be had. *Griswold vs. Railroad*, 90 Ia. 265. A contract may be made waiving a jury trial. *Columbia Bank vs. Okely*, 4 Wheat. 235. A by-law much like the one now before us was applied in *National Ass'n. vs. Ralstin*, 101 Ill. App. 192; *Kelly vs. Supreme Council*, 46 App. Div. 79. A contract providing a rule of evidence was also upheld by this court in *Russ vs. The War Eagle*, 14 Ia. 363. The legislature has not spoken upon this subject, and until it does so we see nothing inimical to public policy in the by-law now before us."

"The rule of evidence established by this by-law is for the mutual benefit of all the million members of this society. The insured had the benefit of this agreement, as well as all other members, and his beneficiaries must share its burdens. Parties have a right to agree as to what proof of death shall be furnished before the policy is payable. Appellee, as a legal entity, has no interest in this matter, apart from its membership, because it is a society organized not for profit."

Steen vs. Modern Woodmen of America, 296 Ill. 104, 115.

Chicago, Burlington & Quincy R. R. Co. vs. Jones, 149 Ill. 361.

Lundberg vs. Interstate Business Men's Accident Ass'n., 162 Wis. 474.

People vs. Rose, 207 Ill. 352.

Chicago Transfer Railroad Co. vs. City of Chicago, 217 Ill. 343.

Munn vs. Illinois, 94 U. S. 113, 134.

Western Union Tel. Co. vs. Commercial Mill Co., 218 U. S. 406, 417.

Martin vs. Railroad Co., 203 U. S. 284, 294.

Corporations can only exercise such powers as may be conferred by the legislative bodies creating them, either by express terms or by necessary implication, and that power, whether at home or abroad, depends upon what power was given by the corporation's creator.

The rights of the respondent under the contract of corporate membership of Mixer depend upon the public acts of Illinois, the domicile of the corporation. It is not the purpose to discuss the conflict of laws as applied to actions on insurance contracts. We have no controversy with the legal principles relating to the determination of the effect given to the *lex loci contractus* in such cases.

Mutual Life Ins. Co. vs. Hill, 193 U. S. 551.
Mutual Life Ins. Co. vs. Cohen, 179 U. S. 262.

The application of the law of Illinois to the case arises from the nature of the contract regardless of the place of the contract. It would not matter in what state the contract was entered into outside of Illinois, so long as it is a contract of membership in an Illinois corporation. The right arising from it will be determined by the decisions of Illinois unless such decisions are rendered invalid by an express and contrary statute of the state in which the contract is entered into.

The petitioner society was organized under the laws of Illinois relating to fraternal beneficiary societies. Whether the by-law referred to as Section 66 (as set out on page 3) having reference to disappearance cases, is valid or not depends upon the power of the legislative body of the petitioner to enact such by-law.

The petitioner in transacting business in its home state is controlled by its charter, as interpreted by the courts of such home state, and, in a like manner, when it transacts business in a state other than the state of its incorporation, it necessarily carries its charter with it, for that is the law of its existence.

The decision in the case of *Royal Arcanum vs. Green,* 237 U. S. 531, is decisive of the questions in this case, in that case the facts appear as follows:

In the case of *Reynolds vs. Supreme Council Royal Arcanum,* 192 Mass. 150, an action was brought by a member of the Royal Arcanum, a beneficiary society, to enjoin the increase of rates of assesment provided for by a by-law of the society. The plaintiff brought the suit on behalf of himself and of others similarly situated. A decree was entered in the Reynolds case holding that the increase of rates of assessment was valid. Afterwards the plaintiff, Green, who lived in New York and whose contract was made in New York, sought in the courts of the state of New York to enjoin the Royal Arcanum from enforcing the increased rates of assessment which had been determined in favor of the society in the Reynolds case, assailing the validity of the increase made in the rates of assessments in 1905 on the ground that it was void as exceeding the powers of the corporation and because conflicting with his contractual rights.

The society, in the trial of that case in the state court of New York, after pleading that the decision in the Reynolds case was controlling, offered in evidence an exemplified copy of the record in the Reynolds suit in the Massachusetts courts. An objection to the introduction of this record in evidence was sustained by the court. This ruling was affirmed by the Supreme Court of New York and finally reached the Supreme Court of the United States. The case was by the court reversed. The court, in an opinion written by Mr. Chief Justice White, reached the conclusion that the judgment entered in the Reynolds case in the Massachusetts courts was controlling and affected the members alike wheresoever located. The power of the corporation was to be measured by decrees of the courts of the corporation's domicile.

A violation of the full faith and credit clause of the Constitution of the United States results from the refusal of the New York courts to hold that the power of a Massachusetts Mutual Benefit society under its charter and by-laws so to amend such by-laws as to increase its assesment rates and the rights and duties of the members of a New York subordinate council with respect to such increase are to be determined by the Massachusetts law, under which, as construed by a judgment of the highest court of that state, such amendment is valid and violates no contractural rights of the certificate holder.

Royal Arcanum vs. Green, supra.

In the *Green case, supra,* the facts would have justified the Supreme Court in deciding the question on the theory that the judgment entered in the Reynolds case in the Supreme Court of Massachusetts was *res judicata* and binding on all the members of the society, including Green, who was a resident of New York. Chief Justice White, however, based the decision upon the theory that the decisions of the courts of Massachusetts, the home of the corporation, were controlling, and as Chief Justice White stated in his opinion that the conclusion of the court did not require it to consider whether the judgment was conclusive in view of the fact that the corporation, for the purposes of the controversy as to assessments, was the representative of the members. The chief justice on page 546 said:

> "Coming then to give full faith and credit to the Massachusetts charter of the corporation and to the laws of that state to determine the powers of the corporation and the rights and duties of its members, there is no room for doubt that the amendment to the by-laws was valid if we accept, as we do, the significance of the charter and of the Massachusetts law applicable to it, as announced by the Supreme Judicial Court of Massachusetts in the Reynolds case, and this conclusion does not require us to consider whether the judgment *per se* as between the parties was not conclusive in view of the

fact that the corporation, for the purpose of the controversy as to assessments, was the representative of the members."

The case of *Hartford Life Insurance Co. vs. Ibs*, 237 U. S. 662, was decided solely on the question of *res judicata*, but it is assumed from the language used by Chief Justice White in the *Green case, supra*, that if the question of a representative suit was entirely eliminated this would not have changed the conclusion reached by the court.

The Supreme Court of North Carolina in the case of *Hollingsworth vs. Supreme Council*, 175 N. C. 615, recognizing the holding in the *Green case*, said (p. 632):

> "The Chief Justice thus concludes the opinion of the court in *Royal Arcanum v. Green*, in regard to the effect of the Massachusetts law and its application to cases in other states: 'Coming then to give full faith and credit to the Massachusetts charter of the corporation and to the laws of that state to determine the powers of the corporation and the rights and duties of its members, there is no room for doubt that the amendment to the by-laws was valid if we accept, as we do, the significance of the charter and of the Massachusetts law applicable to it as announced by the Supreme Judicial Court of Massachusetts in the Reynolds case.' "

In the case of *Sovereign Camp W. O. W. vs. Wirts*, 254 S. W. (Tex.) 637 (official vol. not published), the *Green case, supra*, is followed and approved. The substance of which is expressed in the syllabus as follows:

> "Where Nebraska was the state of incorporation of defendant insurance society, a decision of the Nebraska court that a by-law was *ultra vires* must be given effect by the courts of this state (Texas) under the full faith and credit clause of the federal constitution."

It follows that if the court had held the by-law within the power of the corporation, the Texas court would have been controlled thereby.

The question involved in the Green case is the identical and only question involved in this case.

In the case of *McClement vs. Supreme Court I. O. F.*, 222 N. Y. 470, the question involved was whether the society had the power to increase its rates of assessment. The society was organized under the laws of Canada and was transacting business in New York. The court determined that it was unnecessary to consider whether the power to enact such by-law increasing the rates of assessment was expressly reserved by the society in the contract with the member to change his rate of assessment, because the court reached the conclusion that it had power to change the rates of assessment by the terms of its charter granted by the Parliament of the Dominion of Canada. The court reached the conclusion expressed in the following language (p. 479):

> "The charter or articles of incorporation of a beneficial association become a part of the contract of membership when one joins the association as if written therein, and a member is presumed to have joined with knowledge of their terms and conditions."

In discussing the question whether the society had the power to adopt the by-laws, the court (p. 479) said:

> "The defendant in doing business under its charter was not only governed and controlled by it but was subject to such modifications, restrictions and repeal as should from time to time seem to Parliament to be required by the public good. Its charter is carried with it wherever it goes. Every contract made by it, whether in Canada or elsewhere, is dependent upon its authority. It is true in this case that the plaintiff is a resident and citizen of the state of New York. In many respects the defendant when doing business in this state is subject

to our laws, but its power to contract is dependent upon its charter."

The decisions of the courts of the state in which a benefit society was chartered as to its right to charge against certificates a deficiency in the reserve provided by its constitution, must be given effect by Federal court.

Supreme Council vs. Gallery, 278 Fed. 500.

The case last above cited follows and approves the rule announced in the case of *Royal Arcanum vs. Green, supra.*

In the case of *Canada Southern R. R. Co. vs. Gebhard*, 109 U. S. 527, the court, in discussing the power of a corporation (p. 537), said:

"A corporation 'must dwell in the place of its creation, and cannot migrate to another sovereignty' (*Bank of Augusta v. Earle*, 13 Pet. 588), though it may do business in all places where its charter allows and the local laws do not forbid (*Railroad vs. Koontz*, 104 U. S. 12). But wherever it goes for business it carries its charter as that is the law of its existence (*Relfe v. Rundle*, 103 U. S. 226), and the charter is the same abroad as it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. A corporation of one country may be excluded from business in another country (*Paul vs. Virginia*, 8 Wall. 168), but if admitted, it must, in the absence of legislation equivalent to making it a corporation of the latter country, be taken both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation. Such being the law, it follows that every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts as the known and established policy of that government authorizes. To all intents and purposes, he submits his

contract with the corporation to such a policy of the foreign government, and whatever is done by that government in furtherance of that policy which binds those in like situation with himself, who are subjects of the government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him. He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony. It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it elsewhere."

"By subscribing to stock in a foreign corporation defendant subjected itself to the laws of such foreign country in respect to the powers and obligations of such corporation."

Nashua Sav. Bank vs. Anglo-American Loan, Mortgage, and Agency Co., 189 U. S. 221.

"By becoming a member of a Minnesota corporation, and assuming the liability attaching to such membership, he became subject to such regulations as the state might lawfully make to render the liability effectual."

Bernheimer vs. Converse, 206 U. S. 516, 533.

"A corporation seeking to invoke the doctrine of comity must be possessed of some right or privilege in the state or country of its domicile, and unless it has both existence and some right or power in such state it cannot be awarded any power in a foreign state. Its powers in another state will be measured by its charter and it will not be allowed to exercise therein any powers not conferred upon it either expressly or impliedly by its charter, or the laws of the state of its incorporation. In other words, a corporation cannot do any act beyond the limits of the state or country of its incorporation which it cannot do therein. Charter limitation on the powers of corporations follow them into every state in which they may do business. It follows that when the question for determination is the capacity or disability

of a corporation in any given case, regard must primarily be had to the law of the state or sovereignty from which it has derived its franchises. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. Accordingly, where the charter of a corporation requires that its contracts or other acts shall be executed in a particular manner, this provision must be complied with when the corporation goes into a sister state. So the laws of the state of incorporation must be consulted where the question involved is the right of the corporation to charge interest at a certain rate. Persons who deal with foreign corporations are chargeable with notice of the provisions of their charters and where they enter into contracts which are clearly *ultra vires*, neither party can maintain an action on the contract in jurisdictions which hold to the strict doctrine of *ultra vires*. A foreign corporation defending an action on the ground of *ultra vires*, should plead the statute of the state of its incorporation so that the courts of the domestic state may be informed of the limitations on its powers."

Section 6627, Thompson's Second Edition on Corporations.

In the case of *Palmer vs. Welch*, 132 Ill. 141, the statute of Massachusetts under which the Supreme Council of the Royal Arcanum was organized, provides that such corporations may be formed for the purpose of assisting the widows, orphans, or other relatives of deceased members, or any persons depending upon deceased members. Appellees were relatives, and came within the meaning of the law. Appellant being neither a relative, nor orphan, nor widow of deceased, nor dependent upon him, did not come within the purview of the statute. The court (p. 148) said:

"We must respect the construction given to this statute by the Massachusetts courts. In *American Legion of Honor v. Perry*, 140 Mass. 580, the Supreme Court in that state, in construing the statute, said: 'The statute under which the plaintiff corporation is organized

gives it authority to provide for the widow, orphans, or other persons dependent upon deceased members, and further provides that such fund shall not be liable to attachment. The classes of persons to be benefited are designated and the corporation has no authority to create a fund for other persons than the classes named. The corporation has power to raise a fund payable to one of the classes named in the statute, to set it apart, to await the death of a member, and then to pay it over to the person or persons of the class named in the statute, selected and appointed by the member during his life, and if no one is selected it is still payable to one of the classes named'."

"The contract between a fraternal benefit society and its members, evidenced by the application and certificate, is to be construed in accordance with the laws of the state in which the society was incorporated, and in which its certificates of membership are issued, as well as in accord with the charter and general laws of the society."

Supreme Lodge vs. Hine, 82 Conn. 315.

"While the contract was a Connecticut contract, it was conditioned upon the laws of the society, and its laws, so far as valid, were in harmony with, and all of its contracts included the statute law of the state of its origin relating to fraternal benefit societies."

Supreme Colony vs. Towne, 87 Conn. 644, p. 647.

The society last above mentioned was organized under the laws of Massachusetts and had subordinate bodies called Colonies in other states, under its jurisdiction. The court reached the conclusion that it was a Connecticut contract but that the laws of the state where the society was incorporated were controlling.

In the case of *Relfe vs. Rundle*, 103 U. S. 222, the Life Association of America was a Missouri corporation doing a life insurance business. By the laws of Missouri the Superintendent of Insurance, under certain conditions, might institute proceedings in the courts of that state for the dis-

solution of such a corporation and the winding up of its affairs. In October, 1879, a judgment for a large sum having been rendered in a Missouri court against the insurance company, Relfe, the Insurance Commissioner, commenced proceedings under the statute to dissolve the above named insurance corporation and wind up its affairs. On the 5th day of November, 1879, such an order was made in the cause and a receiver was appointed, and he qualified under his appointment.

In November, 1879, Rundle and wife, appellees, policyholders of the company, commenced suit in the District Court of New Orleans Parish against the Life Association, the local agent of the company, and the owner of the judgment mentioned above, the object of which was to have the assets of the company in Louisiana declared a trust fund and applied to the payment of the claims of Louisiana creditors and policyholders in preference to others, the purpose of the suit being to keep the Louisiana assets out of the hands of Relfe, the Insurance Commissioner of Missouri.

Upon the filing of the bill a receiver was appointed. On the 10th day of November, 1879, the company was dissolved by a decree of the Missouri court and the property vested in Relfe, Superintendent of Insurance, as provided by statute. On the 17th day of November Relfe was made party to the suit in New Orleans, as the legal representative of the late corporation, and on the 28th of the month he filed a petition for the removal of the cause to the Circuit Court of the United States for the District of Louisiana. In his petition he set out the necessary jurisdictional facts and gave the security required by act of Congress, and on the 5th day of December filed in the Circuit Court a copy of the record in the state court. On the 9th of the same month the receiver appointed by the state court moved to dismiss the case and strike it from the docket of the Circuit Court on the ground, among others, that Relfe had no

standing in court, he being a creature of the state of Missouri without capacity to sue or remove causes in Louisiana. The court remanded the cause. From that order an appeal was taken.

The court reached the conclusion that the Circuit Court erred and that Relfe was entitled to the property, and expressed itself (p. 225) as follows:

> "Relfe is not an officer of the Missouri state court, but the person designated by law to take the property of any dissolved life insurance corporation of that state, and hold and dispose of it in trust for the use and benefit of creditors, and other parties interested. The law which clothed him with this trust was, in legal effect, part of the charter of the corporation. He was the statutory successor of the corporation for the purpose of winding up its affairs. As such he represents the corporation at all times and places in all matters connected with his trust. He is the trustee of an express trust, with all the rights which properly belong to such a position. He is an officer of the state, and as such represents the state in its sovereignty while performing its public duties connected with the winding up of the affairs of one of its insolvent and dissolved corporations. His authority does not come from the decree of the court, but from the statute. He appeared in Louisiana not by virtue of any appointment from the court, but as the statutory successor of a corporation which the court had in a legitimate way dissolved and put out of existence. He was in fact, the corporation itself for all the purposes of winding up its affairs.
>
> "We are aware that, except by virtue of some statutory authority, an administrator appointed in one state cannot generally sue in another, and, that a receiver appointed by a state court has no extraterritorial power, but a corporation is the creature of legislation, and may be endowed with such powers as its creator sees fit to give. Necessarily it must act through agents and the state which creates it may say who those agents shall be. One may be its representative when in active operation and in full possession of all its powers, and another if it has forfeited its charter and has no lawful

existence except to wind up its affairs. No state need allow the corporations of other states to do business within its jurisdiction unless it chooses, with perhaps the exception of commercial corporations; but if it does, without limitation express or implied, the corporation comes in as it has been created. Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution.

"By the charter of this corporation, if a dissolution was decreed, its property passed by operation of law to the Superintendent of the Insurance Department of the State, and he was charged with the duty of winding up its affairs. Every policyholder and creditor in Louisiana is charged with notice of this charter right which all interested in the affairs of the corporation can insist shall be regarded. The appellees, when they contracted with the Missouri corporation, impliedly agreed that if the corporation was dissolved under the Missouri laws, the Superintendent of the Insurance Department of the State should represent the company in all suits instituted by them affecting the winding up of its affairs. Relfe, therefore, became, by operation of law, the successor of the corporation in the litigation these appellees instituted in Louisiana. He was, in legal effect, their only opponent in the suit they had begun, and as he appeared in time and was a citizen of Missouri, representing a Missouri corporation, he was entitled to remove the cause and require citizens of Louisiana to litigate their claims with him in the courts of the United States."

The *Relfe case, supra,* well illustrates the controlling influence of the statute of the domiciliary state of the corporation on insurance contracts entered into between the parties when not in conflict with the local state statute.

The corporate powers of the petitioner are measured by the Acts of Illinois.

The legislature of Illinois has determined what is a fraternal beneficiary society. It has stated that such a society shall have a representative form of government and shall exercise the powers of a corporation. Petitioner is transacting business in Nebraska as a fraternal beneficiary society. When Nebraska permitted the defendant to transact business within its borders it thereby consented that this foreign corporation should exercise all of the powers conferred by its charter and the general laws appertaining thereto.

In the case of *Dartmouth College vs. Woodard,* 4 Wheat. 518, Dartmouth College objected to an act of the legislature of New Hampshire relating to its charter, claiming that the legislative act invaded the vested rights of the College. The College had been originally chartered by the Crown. The original incorporating act did not reserve to the lawmaking body the right to amend laws relating to corporations which would affect the stockholders at the time of such enactment. The court reached the conclusion that inasmuch as the incorporating act did not reserve the right to amend acts relating to the corporation, that the legislature did not have the power to interfere with vested rights of the stockholders and that the act so passed was invalid. In other words, the charter as originally granted was controlling and this could not be amended without the consent of the stockholders of the corporation.

In this case the contract provides that the member is to be bound by subsequently enacted by-laws, and in effect, By-Law No. 66, relating to disappearance of members, is the same as though written in the by-laws at the time Mixer became a member of the society, and the power of the society to enact such a by-law is determined by the laws of Illinois relating to fraternal beneficiary societies and the

petitioner's by-laws as interpreted by the decisions of that state.

> "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created."
>
> Chief Justice Marshall in *Dartmouth College vs. Woodward*, 4 Wheat, 518, p. 636.

> "Without ascribing to this body, which, in its corporate capacity, is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes."
>
> Chief Justice Marshall in *Head vs. Providence Ins. Co.*, 2 Cranch. 127, p. 167.

> "But whatever may be the implied powers of aggregate corporations by the common law and the modes by which those powers are to be carried into operation, corporations created by statute must depend both for their powers and the mode of exercising them upon the true construction of the statute itself."
>
> Justice Story in *Bank of U. S. vs. Dandridge*, 12 Wheat. 64, p. 68.

> "It may safely be assumed that a corporation can make no contracts and do no acts, either within or without the state which creates it, except such as are authorized by its charter, and these acts must also be done by such officers or agents and in such manner as the charter authorizes, and if the law creating a corporation does not, by the true construction of the words used in the charter, give it the right to exercise its powers beyond the limits of the state, all contracts made by it in other states would be void. * * * The corporation

must no doubt show that the law of its creation gave it authority to make such contracts through such agents."

Chief Justice Taney in *Bank of Augusta vs. Earle*, 13 Pet. 519, p. 587.

In the cases of *North American Union vs. Johnson*, 142 Ark. 378, the *Knights and Ladies of Honor* was a fraternal beneficiary corporation organized under the laws of Indiana and licensed to do business in Arkansas. In April, 1916, it issued to one Richard T. Johnson its benefit certificate for the sum of $2,000. In August, 1916, the Knights and Ladies of Honor attempted to merge with the North American Union, appellant. The appellant is a fraternal beneficiary society organized under the laws of Illinois. It was never authorized to do business in Arkansas. The question arose as to whether the merger attempted was valid. It was proposed to transfer the members in the Knights and Ladies of Honor to the North American Union without a physical examination. The law relating to fraternal beneficiary societies in Illinois provided that no member could be admitted to membership without a physical examination. The court held that the laws of Illinois were controlling and that the Arkansas courts were compelled to follow the Illinois law. The court (p. 388) said:

"Therefore, under the laws of Illinois, as well as of the laws of appellant, medical examinations are required as a prerequisite to membership in fraternal benefit societies. A certificate issued without such medical examination is an *ultra vires* act upon the part of the corporation which renders such certificate not only voidable but wholly void and of no legal effect. Hence, neither party to such an alleged contract could be estopped by any acts done under it from showing that the purported contract was in violation of the laws of the state."

The court in the case last above cited, follows and approves the rule announced in *Royal Arcanum vs. Green, supra*, in the following language (p. 387):

> "The rights of members of a corporation of a fraternal and beneficiary character have their source in the constitution and by-laws of the corporation and can only be determined by resort thereto, and such constitution and by-laws must necessarily be construed by the law of the state of its incorporation."

In the *North American Union case, supra,* it appeared that the merger had been held invalid by the courts of Illinois. While the decree was rendered by the Circuit Court of Illinois, although an inferior court, was nevertheless a court of general jurisdiction, and the court reaches the conclusion that, inasmuch as that decree was not appealed from, it was binding upon all parties to it. In disposing of that question the court (p. 396) said:

> "Appellant did not appeal from that decree but on the contrary, consented thereto. We, therefore, conclude that, under the laws of Illinois, as expressed in her statute and declared by her courts, Johnson, at the time of his death was a member of appellant and a rightful holder of its policy of insurance, and that the beneficiary named therein is entitled to recover in this action unless Johnson had forfeited his right under the policy."

If the judgment entered in the Circuit Court of Illinois had decreed the merger valid all parties would have been concluded thereby and prevented a recovery.

The right of a corporation to modify the terms of a contract of a corporate membership in it depends upon the power of the corporation.

Where, as in this case, there is an express and clear reservation of the right to amend, the member is bound to take notice of the existence and effect of that reserved power. The power to enact a by-law generally is inherent in every corporation as an incident to its existence. Whether or not a corporation has power to enact a particular by-law depends in a large measure upon the provisions of its char-

ter and the laws under which the corporation is organized. The rights of the beneficiary does not extend beyond the rights of the member; in other words, the beneficiary possesses only such rights as the member possesses.

In the case of *Supreme Lodge K. of P. vs. Knight*, 117 Ind. 489, the court, in discussing this question (p. 499) said:

> "It is enough for us to affirm this proposition; and that we may safely do, both upon principle and authority, without attempting to define what greater rights, if any, the beneficiary has than those of the assured. We do not doubt that both the assured and the beneficiary have a right that is in its nature a vested one, but it is not an unqualified vested right. On the contrary, it is qualified and limited to a great degree. It is a right subject to the limitations, conditions, and restrictions of the charter and the by-laws which are factors of the contract."

In discussing the right to amend by-laws which relate to the power of a fraternal beneficiary society, the Supreme Court of the United States, in the case of *Wright vs. Minnesota Mutual Life Insurance Co.*, 193 U. S. 657, p. 664, said:

> "In the present case we have, by express stipulation, the right to amend the articles, with the reservation noted as to Article 10. Nor does it appear that the changes were arbitrarily made without good and substantial reason. The testimony in this record discloses that the experience of this assessment insurance company was not anomalous or unusual. It was a case of history repeating itself. Insurance payable from assessments upon members may begin with fine prospects but the lapse of time, resulting in the maturing of certificates and the abandonment of the plan for other insurance by the better class risks, has not infrequently resulted in so increasing assessments and diminishing indemnity as to result in failure. The testimony that such was the history of this enterprise is ample. The changes in 1898 to a plan of issuing, in exchange for certificates and upon new business, a policy having some of the features of old line insurance, seems to have

been fully justified by the state of the company's business. And the subsequent change to a policy with straight premiums and fixed indemnity was approved by the majority of the members upon proceedings had under the Minnesota statute, and has resulted in a successful business and a considerable change of the members to the new and more stable plan. It does not appear that any certificate has been unpaid, nor is any failure shown to levy assessments required under the original articles."

The Supreme Court, in discussing the effects of the law of Minnesota, under which the society was organized, said further (p. 665):

> "In our view of the case the law of Minnesota did not impair the obligation of any contract, nor were the changes in the method and plan of this company beyond its corporate powers."

In the case of *Korn vs. The Mutual Assurance Society*, 6 Cranch. 192, the society was incorporated by the legislature of Virginia in 1794. In 1805 the society discovered its country risks were proving much more costly than risks taken on town property. Accordingly, it adopted a by-law placing the town risks in one class at a given rate of assessment and the country risks in another class at another rate of assessment, and providing that a failure to pay assessments should suspend a member's right to insurance. The plaintiffs whose policies were transferred to the country class refused to pay the increased assessment on the ground that the by-laws so changed the contract that they were no longer liable under it. The court, in denying the relief claimed (p. 200), said:

> "The liability of the members of this institution is of a two-fold nature. It results both from an obligation to conform to laws of their own making, as members of the body politic, and from a particular assumption or declaration which every individual signs on becoming a member. * * * 'We will abide by, observe, and adhere to the constitution, rules, and regulations which are already established or may hereafter be established by a

majority of the assured, * * * or which are, or may hereafter be established by the president and directors of the society.' It would be difficult to find words of more extensive significance than these or better calculated to aid, explain, or enforce the general principle that a *majority of a corporate body must have power to bind its individuals.*"

The court also said (p. 201):

"As to what is contended to be a material alteration in their charter, we consider it merely as a new arrangement or distribution of their funds; and *whether just or unjust, reasonable or unreasonable, beneficial or otherwise to all concerned, was certainly a mere matter of speculation,* proper for the consideration of the society, and which no individual is at liberty to complain of, as he is bound to consider it as his own individual act. Every member, in fact, stands in the peculiar situation of being party of both sides, insurer and insured. Certainly the general submission which they have signed will cover their liability to submit to this alteration."

The question involved in the case last above cited was again brought before the court in the case of *Society vs. Korn,* 7 Cranch 396, on the ground that the "former case" had merely established the continuance of the original contract, and that he was not liable for the increased assessment authorized by the change in the by-laws. The court (p. 399) said):

"* * * it is contended that the contract being complete between the parties, the insurers cannot add to the consideration to be paid for insurance. In general this doctrine is unquestionably correct, but peculiar circumstances except this from ordinary cases. This subject was considered in the quoted case decided between these same parties in February, 1810. It is there laid down, and on reflection we are confirmed in the opinion that in the capacity of an individual of the body corporate the defendants are bound by the by-laws of the society as far as is consistent with the nature of its constitution."

"The trial court held that the question was solely one of power * * *. Each member of the society is an insurer as well as an insured, and I think as an insurer he must be deemed to have contracted to pay his just and ratable share of the amount necessary to enable the defendant to keep its contract with its members and pay their dependants the stipulated sum, and the parties should have understood that changed conditions might necessitate a readjustment of rates, and hence that the society, under the reserved power to amend its by-laws assented to by the plaintiff, could make such readjustment."

Mock vs. Supreme Council Royal Arcanum, 121 App. Div. 474, 475, 476, 477.

In the case of *Gaines vs. Supreme Council Royal Arcanum, supra*, the court, in discussing the right of a corporation to modify the terms of a contract of corporate membership (p. 979), said:

"It must be apparent that it is an extremely delicate question for the courts of any jurisdiction other than Massachusetts, the state of defendant's creation and the state of its domicile, to interfere by injunction with the internal regulation and management of the affairs of this benevolent association. The contract is, of course, founded not only in the certificate of membership, but in the properly adopted by-laws and regulations or the laws of Massachusetts under which the association is incorporated, and it is obvious enough that the law of Massachusetts furnishes the rule for the decision of the question now up for disposition and all similar questions relating to this association and its powers and authority. If the court may interfere by injunction in a case like this it must be distinctly upon the closely drawn issue whether vested and constitutionally protected rights are being interfered with or impaired. If the courts of any state may exercise jurisdiction for such purposes outside of the state in which the defendant association was created and has its principal office and domicile, it is equally true that the courts of the forty-three or forty-four different states where members may be can exercise similar power and authority.

> If this were done it would speedily bring about such a situation as would make emphatic the proposition that the courts of any states other than Massachusetts should only exercise authority to interfere by injunction with the internal management and operation of the association upon the clearest and most cogent grounds."

In the *Green case, supra,* this Court reached the conclusion that a corporation could modify the terms of the contract with the members only when it was in conformity with the provisions of the charter of the corporation as interpreted by the decisions of the courts of the state in which the corporation was chartered. Mr. Chief Justice White said in effect, in his opinion, that when the court of Massachusetts had determined what the power of the society was in reference to the changing of the contractual terms by the enactment of by-laws, that was binding upon the courts of other states, even though the members resided in such other states; in effect, holding that when the member joined in some state other than Massachusetts his rights were to be determined by the charter of the corporation and its powers as interpreted by the courts of Massachusetts, the home state of the corporation.

"Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state" implies that the public acts of every state shall be given the same effect by the courts of another state that they have by law and usage at home.

The theory of the constitution is that it applies to the public acts of the state as well as the decisions of the courts. When a corporation, organized under the laws of a given state, goes into another state to transact business the public acts of the home state of the corporation and the charter of the corporation are carried with it wherever it goes. Every contract that is entered into, whether in the home state or elsewhere, is dependent upon the authority of the public acts and the charter of the corporation. In rela-

tion to the power and authority of the corporation they must be given the same force and effect as in the home state.

"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; and the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof. It is not pretended that any judgment of the state of Ohio was disregarded by the courts of New York, but it is contended that full force and effect was not given to the constitution of the state of Ohio. This duty is as obligatory as the similar duty in respect to the judicial proceedings of that state."

Justice Brewer in *Smithsonian Institute vs. St. John*, 214 U. S. 19, 28.

"* * * in respect to the faith and credit to be given by the courts of one state to the judgments of the courts of another state, and it is equally applicable to the faith and credit due in one state to the public acts of another."

Chief Justice Waite in *R. R. Co. vs. Wiggins Ferry Co.*, 119 U. S. 615, 623.

"The constitution declares that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and that congress may not only prescribe the mode of authentication, but also the effect thereof. Section 905 prescribes such mode, and adds that the records and judicial proceedings so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken. Such is the Congressional declaration of the effect to be given to the records and judicial proceedings of one state in the courts of every other state. In other words, the local effect must be recognized everywhere through the United States.

Justice Brewer in *Hancock National Bank vs. Farnam*, 176 U. S. 640, 642.

"If this were a case arising in the state of New York we should therefore follow the construction put upon the statute by the courts of that state. The circumstance that the case comes here from the state of Florida should not leave the statute open to different construction. It would be an anomaly for this court to put one interpretation on a statute in a case arising in New York and a different interpretation in a case arising in Florida."

Justice Woods in *Flash vs. Conn*, 109 U. S. 371, 379.

Corporate necessity recognizes the controlling effect of the law of the home state of the corporation.

Royal Arcanum vs. Green, 237 U. S. 531.
Graham vs. First National Bank, 84 N. Y. 393.
Canada Southern R. R. Co. vs. Gebhard, 109 U. S. 527.

The laws of the society are enacted by its legislative body for the benefit of all of its members and when that legislative body has determined that it is in the interest of the society and the members thereof that a given by-law should be enacted, and that by-law has been construed by the courts of the state under which the society gets its authority to transact business, that construction of a by-law enacted by the representatives of the entire membership and so construed, should be upheld by the courts in the states other than the state in which the society received its authority to transact business.

If the legislature has not limited the charter powers of foreign beneficiary societies, the charter as interpreted by the courts of the home state is controlling.

In the cases of *Thomas vs. Matthiessen*, 232 U. S. 221; *National Mutual Building & Loan Association vs. Brahan*, 193 U. S. 635; *New York Life Insurance Co. vs. Cravens*, 178 U. S. 389, and *Pinney vs. Nelson*, 183 U. S. 144, the statutes of the domiciliary state were rendered nugatory by contrary legislation in the states in which the corporations were transacting business, it being held that the corpora-

tions might be deemed to have accepted the contrary legislation by coming into the state.

In the case of *Supreme Lodge Knights of Pythias vs. Meyer,* decided by this Honorable Court on the 28th day of April, 1924 (official report not yet published), the legislative body of the society had increased the rates of assessment. The Federal District Court of Indiana, affirmed by the Circuit Court of Appeals *(Holt vs. Supreme Lodge,* 235 Fed. 885), establish the validity and enforcibility of the increased rates. The Knights of Pythias pleaded that the decree in the Holt case was binding as *res judicata* upon Meyer as plaintiff. The Nebraska statute relating to fraternal beneficiary societies provides that such societies shall have, among other things, a representative form of government, and it was contended by Meyer that the Knights of Pythias, not having a representative form of government, could not amend its by-law increasing rates of assessment so as to be effective upon the membership in Nebraska. In other words, the plaintiff claimed that the statute of Nebraska limited the power of the society. The Supreme Court of Nebraska reached the conclusion that the judgment in the Indiana Federal Court was not binding upon the Nebraska Court for the reason that the Knights of Pythias did not have a representative form of government. This court held that it must give the construction given to a state statute by the highest court of the state the same as though it were specifically expressed in that statute. The statute of Nebraska having made nugatory the conclusion reached in the Federal Court in the *Holt case, supra,* such statute was controlling.

If the statute of New York had required a fraternal society to have a representative form of government, and the Supreme Court of New York had found that the Royal Arcanum did not have a representative form of government, the decision in the *Green case, supra,* following the rule announced in the *Meyer case, supra,* would undoubtedly have been in favor of Green. Foreign fraternal beneficiary

societies are controlled through the statute of the state and not through its judicial tribunals.

Nelson vs. Nederland Life Ins. Co., 110 Ia. 600.
American Fidelity Co. vs. Bleakley, 157 Ia. 442.

Prior to the decision in the Green case by the Supreme Court of New York that court had reached a conclusion in two cases that a fraternal beneficiary society did not have the power to increase its rates of assessment.

Wright vs. Maccabees, 196 N. Y. 391.
Dowdall vs. Supreme Council, 196 N. Y. 405.

There being no statute in the state of New York antagonistic to the power of the Royal Arcanum, as announced in its charter and the statute of Massachusetts, it was held that the charter of Royal Arcanum and the statutes of Massachusetts, the domiciliary state of the corporation, as interpreted by the courts of Massachusetts, were controlling.

The legislature of Nebraska has enacted no statute invalidating the provisions set forth in By-Law 66; that is, the legislature has not enacted any law which makes invalid a contract of this kind or a contract relating to a rule of evidence, and has not enacted any statute invalidating a contract limiting or extending the time in which an action may be commenced.

In the cases of *Dvorak vs. Supreme Lodge*, 101 Neb. 297; *Dolan vs. Supreme Council*, 152 Mich. 266; *Weiditschka vs. Maccabees*, 188 Ia. 183, and *Dennis vs. Modern Brotherhood of America*, 119 Mo. App. 210, conflicting statutes between the domiciliary state of the beneficiary society and the state where doing business were involved, and in each case the court reached the conclusion that the statutes of the state where the societies were doing business controlled rather than the domiciliary states of the societies.

If the legislature of Nebraska had not enacted a statute which provided those only who could take as beneficiaries,

then in the *Dworak case, supra,* the statutes of Iowa would control, but inasmuch as the legislature of Nebraska provided the class of beneficiaries only who could take it nullified the statute law of Iowa which provided who could be beneficiaries.

In the cases of *McElroy vs. Insurance Co.,* 84 Neb. 866, and *Rye vs. New York Life Insurance Co.,* 88 Neb. 707, the insurance companies contended that the policies of insurance had been forfeited on account of the failure to pay premiums. The plaintiffs contended that there were no forfeitures because no notices had been served that forfeitures would be declared in conformity with the statute of New York. The question then arose as to whether the statute of New York was controlling in Nebraska. The Nebraska court reached the conclusion that the New York statute was not controlling for the reason that it did not have any extraterritorial application, it being confined to the policyholder residing within the state of New York. The natural inference is that the New York statute would have controlled if it applied to all policyholders alike.

Similar questions were decided in the case of *Mutual Life Insurance Co. vs. Cohen,* 179 U. S. 262, and related to the New York statute. The same question was disposed of in the case of *Mutual Life Insurance Co. vs. Hill,* 193 U. S. 551. The Supreme Court in the two cases above mentioned, reached the conclusion that the statute of New York did not have any extraterritorial application and that it only applied to policyholders within that state. Justice Brewer, in the *Cohen case,* in discussing this question (p. 266), said:

> "These considerations led to the conclusion that the statute of New York, directed as it is to companies doing business within the state, was intended to be, and is in fact, applicable only to business transacted within that state."

Justice Brewer, discussing another phase of the same question in the *Cohen case* (p. 267), said:

> "Further, it may be noticed that even if the language justifies a broader construction it may well mean that only such laws of the state of New York as are intended to and do change the charters of the companies, or are intended to have extraterritorial application, should be considered a part of the policy."

In the *Rye case, supra,* the court, in discussing this question (p. 711), said:

> "Finally, it is plaintiff's contention that there could be no forfeiture of the policy until after notice of the company's intention to forfeit the same, and to support that contention a certified copy of the laws of the state of New York passed in the year 1892, providing for such notice, was offered in evidence. The defendant ,however, introduced in evidence that law as amended in 1898, which provides that such notice shall only apply to policies issued to persons residing in that state. The policy contains no provision requiring such notice, but by its terms is automatically forfeited for non-payment of premiums. The law invoked by the plaintiff having no extraterritorial force, this contention cannot be sustained."

The fact that the New York statute might be effective in Nebraska when there was no statute in this state in conflict therewith does not in any way conflict with the theory that it is a Nebraska contract, but being a Nebraska contract it includes therein the law of the state in which the corporation has received its charter. In discussing this question the Supreme Court of Iowa, in the case of *Nelson vs. Nederland Life Insurance Co.,* 110 Iowa 600, p. 604, said:

> "Whether the policy is a New York contract or not, the laws of this state relating to procedure control. Foreign insurance companies are not compelled to do business in this state. If they voluntarily choose to do so, however, they must submit to such conditions and restrictions as the legislature may see fit to impose."

In the case of *American Fidelity Co. vs. Bleakley*, 157 Iowa 442, the court in discussing this question further (p. 446), said:

> "The state has the undoubted right to say whether foreign corporations shall be permitted to do business here at all, and, if such permission is granted, it may be upon such terms and conditions as the state shall prescribe. And, where it is the manifest intention to limit or restrict the powers given to such corporation by its charter, courts have no authority to override such legislation on the ground of comity between the states. Within its power, the state, through its legislature, is supreme, and the court's duty is ended when it determines what the statutory law is."
>
> *Prudential Ins. Co. vs. Cheek*, 259 U. S. 530.

The legislature of Nebraska has decreed that a fraternal beneficiary association, in order to transact business in this state when organized in a foreign state, shall be organized and carried on for the sole benefit of its members and their beneficiaries and not for profit. It must have a lodge system with ritualistic form of work and representative form of government, and before its by-laws shall be effective they shall be filed, properly certified to, with the Insurance Commissioner, and when it has complied with the statute in these respects it is authorized to do business, and its powers are determined by the charter that has been issued to it by the state in which it was organized, together with the interpretation of the power as contained in that charter by the courts of such state, and the charter, as interpreted, is included in and made a part of that contract. The member is conclusively presumed to have contracted with a view to such laws of the home state pertaining to the charter because the corporation must, of necessity, be controlled by them, and it has no power to contract with a view to any other laws unless and until the legislature has limited and curtailed the powers as outlined in the charter of the foreign corporation.

The petitioner has complied in all respects with the laws of Nebraska. The provisions of the statute of Illinois seem to be in harmony with the statute of Nebraska. The defendant society is in Nebraska with its charter. It cannot be contended that this charter is not in full force and effect. Can it be said that this charter is not all powerful so far as the society is concerned? It cannot be that the society is in Nebraska operating independent of its charter! Can we eliminate the charter in considering the extent of the power of the society? Is not the proper answer to these questions that the society is in Nebraska with its charter in full force and effect and that it has power to do that which its charter authorizes as interpreted by the courts of the home state of the society?

The legislature of Nebraska in its wisdom has not deemed it advisable to limit the charter powers of foreign fraternal beneficiary societies on matters treated in the by-law in question, and as the charter of the petitioner is in all respects in harmony with the statutory laws of Nebraska, this disappearance by-law, interpreted by the courts of the home state of the corporation to be within its powers, is unimpeached and paramount, and the failure of the court to give full faith and credit to the public acts and judicial proceedings of Illinois, and to the judgment and proceedings of the highest judicial tribunal of Illinois, the place of petitioner's incorporation and domicile, upholding the validity of said by-law and the power of petitioner to enact it, is a violation of Section 1, Article 4, of the Constitution of the United States.

Respectfully submitted,

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TRUMAN PLANTZ,
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Supreme Court of the United States

October Term, 1924

No. 308

MODERN WOODMEN OF AMERICA,
Petitioner,

vs.

JENNIE VIDA MIXER.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

SUPPLEMENTAL BRIEF FOR PETITIONER

The question whether payment of assessments shall cease at the expiration of seven years' unexplained absence of the member or shall continue to be paid for the period of the expectancy of life of the member is one which affects the financial interest of every member of the society.

The purpose of this supplement to the original brief is to present some additional reasons in support of the position taken by petitioner in its original brief.

In the case of *Royal Arcanum vs. Green*, 237 U. S. 531, Mr Chief Justice White, speaking for the court, stated that an assessment which was one thing in one state and another thing in another state would, in practical effect, amount to no assessment at all. In the Green case the increased rate of assessment was involved, and the fact that the rate should be uniform and should apply to all members alike

was one of the moving causes for holding that the decision of the home state of the Royal Arcanum was controlling. If the various states should decide this question for themselves, other than the home state of the corporation, the different views of the courts prevailing would result in one assessment in the home state of the corporation and another in the state in which the litigation arose.

Petitioner's By-Law, known and referred to as Section 66, provides that seven years absence will not be evidence of death and that the beneficiary may not maintain an action until the end of the expectancy of life of the member, according to the National Fraternal Congress Table of Mortality. In the case of *Steen vs. Modern Woodmen of America*, 296 Ill. 104, in which was involved the validity of Section 66, and which judgment and opinion are pleaded as a defense in this case, the member disappeared in 1910 and his expectancy of life, according to the above named table of mortality, figured from the date of his disappearance and as stated in the opinion (Rec., p. 20), was 29.9 years. That is, in order to mature Steen's certificate he, or some one for and in his behalf, would be required to pay assessments for the period of 29.9 years. Each member of the Society, no matter where situated, is interested in the payment of Steen's assessments for that period of time.

In this case Mixer, the member, at the time of his disappearance in 1911 was fifty-two years of age (Rec., p. 5), and his expectancy of life according to the National Fraternal Congress Table of Mortality, figuring as of the date of his disappearance, was 20.7 years. If the payments of assessments are to be uniform, he, or some one in his behalf, should be required to pay assesments during his expectancy of life, to-wit, for the period of 20.7 years.

According to the decision of the Nebraska Supreme Court it was not necessary to pay assessments after the action was commenced. The question of whether death losses should be paid at the expiration of seven years from

the disappearance of the member or whether assessments shall be continued to be paid for the period of the life expectancy of the member according to the National Fraternal Congress Table of Mortality is one which affects the financial interest of every member of the Society and is a matter of great concern to each member of the Society.

In order that the payment of assessments shall be uniform, as suggested in the Green case, supra, the decisions of the home state of the corporation thereon should be controlling. In the Steen case, supra, the Supreme Court of Illinois, in interpreting the power of the defendant association in construing By-Law No. 66, determined that the assessments should be paid on Steen's certificate during his expectancy of life, according to the above named table, and in order that all members of the Society should be treated in a like manner the member Mixer and his beneficiary should be required to pay assessments during the time of Mixer's expectancy of life, according to the above named table.

In the Steen case, supra, the court in discussing the legal presumption of death from seven years unexplained absence (Rec., p. 28), said:

> "The legal presumption of death from 7 years' unexplained absence arose by analogy under two early English statutes, the one exempting from the penalty of bigamy any person whose husband or wife should be continuously beyond the seas or should absent himself or herself for the space of seven years together, and the other providing that persons in leases for lives who shall remain beyond the seas or absent themselves from the realm for more than 7 years shall, in the absence of proof to the contrary, be deemed naturally dead. That the rule in question is merely a rule of evidence is unquestioned. Stevenson v. Montgomery, 263 Ill. 93, 104 N. E. 1075, Ann. Cas. 1915C 112. It is so treated by all the textbook writers. It was a rule born of necessity, to prevent the prosecution for bigamy of a deserted spouse, on the one hand, and to

settle the property affairs of the absentee on the other hand. It grew up in England at a time when travel was fraught with every danger known to man and when means of communication were primitive. Since this rule of law was established the social aspects of our civilization have been almost revolutionized. The improbability that accident, injury, sickness or death could overtake a member of this society without information of the fact reaching his family and friends is very great. In case of need he scarcely could fail to find assistance among the million members of his own fraternity. Hospital, police, burial, and other records are collected and preserved in practically every state in this country and newspapers are published in every city and village, and except for the reasons for which the law was originally established there is now no sound reason for continuing the rule except that it has existed for so long a time that convenience makes it the best rule to follow where no other rule is established by statute or by agreement."

In the case of *Hartford Life Insurance Co. vs. Ibs*, 237 U. S. 662, the court reached the conclusion that it was error for the court of another state than that of the home state of a life insurance company issuing certificates on the assessment plan, to exclude a decree of the court of the home state by which it was adjudicated that the company had the right to make advances from its mortuary fund to pay death claims and to replenish the fund by collections from a subsequent assessment upon its members, in which case, speaking of the character of the mortuary fund from which death claims must be paid, the court (p 670) said:

"The fund was single, but having been made up of contributions from thousands of members their interest was common. It would have been destructive of their mutual rights in the plan of mutual insurance to use the mortuary fund in one way for claims of members residing in one state, and to use it in another way as to claims of members residing in a different state. To make advances replenished by assessments against those living in Connecticut, and to make advances without the right to replenish against those

living in Wisconsin, would have destroyed the very equality the assessment plan was intended to secure. Manifestly the question as to the ownership and proper administration of the fund could not be left at large for collateral decision in every suit on certificates held by those who had failed to pay the assessment. For whether the members of the 'Safety Fund Department' are regarded as occupying a position analogous to that of shareholders, or are treated as beneficiaries of trust property in the hands of the company, as trustee, in the state of Connecticut, the courts of that state had jurisdiction of all questions relating to the internal management of the corporation. *Selig vs. Hamilton*, 234 U. S., 652. *Mutual L. Ins. Co. vs. Harris*, 97 U. S. 336. *Condon vs. Mutual Reserve Fund Life Assn.*, 89 Md., 99. *Maguire vs. Mortgage Co.*, 203 Fed., 858."

The federal question raised in this case pertains to the applicability of the full faith and credit clause of the Constitution of the United States, and must be determined by the decision of the court of last resort of the state of its creation and domicile, which has the final decision of questions involving the validity of its constitution and by-laws. The court, therefore, should be controlled by the decisions of the home state of the corporation and must give full faith and credit to the decision of the Supreme Court of Illinois, the home state of the petitioner, holding that Section 66 of the by-laws, as amended, is valid and binding.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1924

No. 308

MODERN WOODMEN OF AMERICA.....Petitioner

vs.

JENNIE VIDA MIXER .....Appellee

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

STATEMENT

Petitioner on Page 12 of its brief, under the heading "Abridgement of specifications of errors" set out the one objection that is raised in this case and the only one. The question is, "Did the Supreme Court of Nebraska, in affirming the trial court in this case, deny full faith and credit to the public acts of Illinois and the judgment entered in the case of Steen vs. Modern Woodmen of America, 296 Ill., 104, which case held that the petitioner had the power under its acts and the public acts of Illinois to enact the by-law in question?", (Rec., p. 17). That by the Supreme Court of Nebraska not following the interpretation placed upon said by-

law by the Illinois Court, did it violate Section 1, Article IV of the Constitution of the United States.

The appellee raises one objection to the procedure. We contend that the petitioner should have asked for a review of this case in this court by a writ of error instead of by a writ of certiorari, and we quote here the last paragraph of Judicial Code 237, as amended by act of Feb. 17, 1922 (42 Stat. 366):

> "In any suit involving the validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest court of a state applicable to such contract would be repugnant to the Constitution of the United States, the Supreme Court shall, **upon writ of error,** re-examine, reverse, or affirm the final judgment of the highest court of a state in which a decision in the suit could be had, if said claim is made in said court at any time before said final judgment is entered and if the decision is against the claim so made."

ARGUMENT

I

THIS CASE SHOULD HAVE BEEN BROUGHT TO THIS COURT BY A WRIT OF ERROR INSTEAD OF A WRIT OF CERTIORARI.

Appellee will take up the second assignment of error first. Under the statute above quoted it seems clear that where the validity of a contract is involved, wherein it is claimed that a change in the ruling of law or construction of a statute by the highest court of the state applicable to such contract would be repugnant to the constitution of the United States this court shall re-examine such question upon a writ of error only. This case involves the insurance policy of Walter Crocker Mixer and involves the construction of the contract.

This case not being brought to this court by writ of error should be dismissed.

II.

THE CONTRACT SUED UPON WAS DELIVERED AND FIRST BECAME EFFECTIVE IN THE STATE OF SOUTH DAKOTA. THERE IS NEITHER PLEADING OR PROOF AS TO THE LAWS OF THAT STATE. THE LAW OF SOUTH DAKOTA IS THEREFORE PRESUMED TO BE THE SAME AS THE LAW OF NEBRASKA. THIS IS TRUE AS TO BOTH STATUTORY AND COMMON LAW.

The record contains repeatedly evidence without contradiction, and counsel for the petitioner, while not admitting it in the brief in this court admitted in the brief in the Supreme Court of Nebraska that the contract between the petitioner and Walter Crocker Mixer was delivered and first became effective in the state of South Dakota, and that the law of South Dakota is presumed to be the same as the law of Nebraska.

There is in the pleadings and the evidence no reference to the law of South Dakota upon any of the questions involved in this case, and for the purposes of this case it must therefore be conclusively presumed that the law of South Dakota is the same as the law of Nebraska, both as to statutory and common law.

Stark v. Olsen, 44 Neb., 646.
Council Bluffs v. Griswold, 50 Neb., 753.
Bannard v. Duncan, 79 Neb., 189; 112 N. W., 353.
Haggin v. Haggin, 35 Neb., 375.
Scroggin v. McClelland, 37 Neb., 644.
Chapman v. Brewer, 43 Neb., 890.
Smith v. Mason, 44 Neb., 610.

The presumption must therefore be indulged that the by-law relied upon by the appellant is under the law of South

Dakota unreasonable, void and of no effect, because of the fact that that is the conclusion reached by the court of this state, and as this case is presented to this court, the law of South Dakota is presumed to be the same as the law of Nebraska.

Mixer v. M. W. A., 197 N. W., 129 (This case).
Garrison v. M. W. A., 105 N. W., 25; 178 N. W., 842.

III

THE CONTRACT IN SUIT SHOULD BE CONSTRUED AND ENFORCED ACCORDING TO THE LAW OF THE PLACE WHERE MADE.

On Page 16 of the record in the answer of petitioner they allege in quoting from the application of Walter Crocker Mixer as follows:

> "This benefit certificate is issued and accepted only upon the following express warranties, conditions, and agreements: 1. That the Modern Woodmen of America is a Fraternal Beneficiary Society, incorporated, organized, and doing business under the laws of the state of Illinois, *and legally transacting such business in the state where said member resides.*"

The application contains such statements and recitals as these:

> "Neighbor Walter Crocker Mixer, a member of Forrest Camp No. 1957 of the Modern Woodmen of America, located at Elk Point, County of Union, State of South Dakota, is, etc." (Rec. P. 2).

Endorsed on the certificate is the following (Rec. P. 5)

> "Member adopted and certificate delivered this 20th day of November, 1901."

This is signed by the officers of Forrest Camp No. 1957, Modern Woodmen of America, at Elk Point, South Dakota, and immediately following such statement and signatures is the statement:

> "I hereby accept the above benefit certificate and agree to all the conditions therein contained.
> (Signed) W. C. Mixer." (Rec. p. 5).

The record shows therefore that the insured made application to the local camp at Elk Point, South Dakota, to become a member thereof, and provided in his application that no right should accrue to him, until he had been adopted and made the payments required at adoption, and that the certificate should only be delivered to him after adoption, all in accordance with the by-laws of the society, and the endorsement upon the certificate shows that this is what was done, and at the same time that he was adopted into the local camp the certificate was delivered to him and he accepted it, paid the dues and charges required. So that all of the acts which made the certificate a contract took place at Elk Point, South Dakota, and not in the state of Illinois, the appellant acting by and through its local Camp and the officers thereof as its agents, and the insured acting for himself. It is therefore quite immaterial that the Constitution of the United States provides that full faith and credit must be given to certain records and acts of each state when they become important in some other state. The situation presented by this record compels the presumption that the law of South Dakota is the same as the law of Nebraska, and hence the trial court was right in sustaining the demurrer to what is called in this record the "first affirmative ground of defense" of the defendant (Division I, Rec. p. 12).

The general rule that the construction of a contract of insurance and the rights and obligations of the parties thereto must be determined by the law of the place where the contract is made, is supported by a number of recent cases.

Equitable Life Assurance Society vs. Pettus, 140 U. S. 228; 35 L. Ed. 497.

Mutual Life Ins. Co. vs. Cohen 179 U. S. 263; 44 L. Ed. 181.

Supreme Council vs. Meyer 198 U. S. 508; 49 L. Ed. 1146.

Life Ins. Co. vs. McCue, 223 U. S. 234, 38 L. R. A. (N. S.) 57.

Ingersol vs. Ins. Co., 156 Ill. App. 568.

Wilde vs. Wilde, 95 N. E. 295 (Mass.)

Green vs. Supreme Council, 124 N. Y. S. 398.

Head vs. Ins. Co., 147 S. W. 827 (Mo.).

In Northwest Mutual Life Ins. Co. vs. McCue et al., 223 U. S. 234, 38 L. R. A. (N. S.) 57, there was considered a contract issued by the insurance company, a Wisconsin corporation, to the insured, a resident of Virginia, and the question as to the law of which state should govern was important because of certain decisions of the courts of the state of Illinois, construing like contracts of the insurance company. The court, speaking by Mr. Justice McKenna, said:

"The obligation of the contract undoubtedly depends on the law under which it is made. In which state then, Virginia or Wisconsin, was the policy made? In Equitable etc. vs. Clements, 140 U. S. 226 the question arose whether the contract of insurance was made in New York or Missouri. The insured was a resident of Missouri and the application for the policy was signed in Missouri. The policy executed at the office of the company provided that the contract between the parties was completely set forth in the policy, and the application therefore taken together. The application declared that the contract should not take effect until the first premium should have been actually paid — Two annual premiums were paid in Missouri and the policy, at the request of the assured was transmitted to him in Mi-

souri, and there delivered to him. The court said: 'Upon this record the conclusion is inevitable that the policy never became a completed contract binding either party to it until the delivery of the policy, and the payment of the first premium in Missouri, and consequently that the policy is a Missouri contract governed by the laws of Missouri.'

"In Mutual Life Ins. Co. vs. Cohen, 179 U. S. 262, the insurance policy contained a stipulation that it should not be binding until the first premium had been paid, and the policy delivered. The premium was paid and the policy delivered in Montana. It was held that 'under these circumstances, under the general rule the contract was a Montana contract and governed by the laws of that state.'

"The same conditions existed in Mutual Life Ins. Co. vs. Hill, 193 U. S. 551. It was decided, the two cases above mentioned being cited, that the policy of insurance was a Washington contract and not a New York contract.

"In the case at bar, the application was made by McCue at Charlottsville, Virginia—the policy was delivered to him there. It is provided in the policy that it should not take effect until the first premium should be actually paid. Following the provision is this: "In witness whereof the Northwest Mutual Life Ins. Co. at its office in Milwaukee, Wisconsin, has by its president and secretary signed and delivered this contract this 15th day of March, 1904.' But manifestly this was not intended to affect the preceding provision fixing the time when the policy should go into effect, nor the legal consequences which followed it. In Equitable, etc., v. Clements, supra, the policy was executed at the company's office in New York. The exact conditions therefore existed which made, in the cases cited, the policies

involved therein not New York contracts but respectively Missouri, Montana, and Washington contracts. The policy therefore in the case at bar must be held to be a Virginia, and not a Wisconsin, contract."

The court therefore held that the contract was a Virginia contract, and the "obligation of a contract undoubtedly depends upon the law under which it is made."

In the case of Supreme Council v. Mayer, 198 U. S., 508 49 L. Ed. 1146, this court held:

> "All matters respecting the remedy and admissibility of evidence depend upon the law of the state where the suit is brought."

The rule of law in Nebraska is that seven years of unexplained absence is presumption of death, and this petitioner attempted by a private contract in the way of a bylaw, to change the law of Nebraska. Nebraska courts have held this by-law unreasonable. If Nebraska will be compelled to follow the Illinois decision, then all foreign corporations will have an advantage over domestic corporations. Nebraska corporations will be bound by the seven-year ruling while all foreign insurance corporations will be bound by a more liberal rule. If the foreign corporations are permitted to do this they can practically contract out all the laws of Nebraska.

The answer admits the facts showing the delivery and consummation of the contract sued upon at Elk Point, South Dakota (Rec. p. 11-12). The allegations of division one of the answer do not constitute a defense to the cause of action alleged by the appellee. This part of the answer presented no federal question, and the court properly so held (Rec. p 35). The fact that the court of Illinois has construed the by-law in question to be reasonable and enforcible is not as the authorities hereinbefore referred to clearly show, important in the situation presented by this record. No other point is con-

tended for in the brief of the petitioner. As to the facts of the disappearance, there is no dispute. The evidence in this case brings it clearly within the rule that seven years of continuous unexplained absence of a person without tidings to his relatives or persons who would likely hear from him, creates a presumption of death.

Respectfully submitted,

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GEORGE W. LEAMER,
Of Counsel.

MODERN WOODMEN OF AMERICA *v.* JENNIE V. MIXER.

CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

No. 308. Submitted March 18, 1925.—Decided April 13, 1925.

1. Becoming a member of an incorporated beneficiary society is more than a contract; it is entering into a complex and abiding relation; and the rights of membership are to be governed by the law of the State of the society's incorporation. P. 551.
2. Hence other States, irrespective of where the certificate of membership was issued, cannot attach to a membership rights against the society which are refused by the law of the domicil. *Id.*
3. Where a by-law of such a corporation provided that absence of any member unheard of should not give any right to recover on any benefit certificate until the member's expectancy of life had expired, and this was upheld by the Supreme Court of its domiciliary State even as against memberships antedating the by-law, *held* that a decision of a court of another State denying it this effect failed to give full faith and credit to the domiciliary charter. *Royal Arcanum* v. *Green*, 237 U. S. 531. *Id.*

197 N. W. 129, reversed.

CERTIORARI to a judgment of the Supreme Court of the State of Nebraska which affirmed a judgment for the plaintiff (here respondent) in an action on a benefit certificate.

Mr. Nelson C. Pratt, with whom *Messrs. Truman Plantz, Frank M. McDavid, George G. Perrin,* and *George H. Davis* were on the briefs, for petitioner.

The question whether payment of assessments shall cease at the expiration of seven years' unexplained absence of the member or shall continue to be paid for the period of the expectancy of life of the member is one which affects the financial interest of every member of the society. *Royal Arcanum* v. *Green*, 237 U. S. 531; *Steen* v. *Modern Woodmen of America*, 296 Ill. 104; *Hartford Life Insurance Co.* v. *Ibs*, 237 U. S. 662.

When the petitioner came into Nebraska it brought its charter with it, and its power to do any given thing is to be determined by that charter and the interpretation of it by the courts of Illinois. The Nebraska courts failed to give full faith and credit to the decision and judgment of the court of Illinois in the case of *Steen* v. *Modern Woodmen*, 296 Ill. 104.

Where either the application or the benefit certificate contains an agreement on behalf of the member to be bound by after-enacted by-laws, after-enacted by-laws are valid and the member is bound thereby.

The application made by the member and the benefit certificate provide that the laws, rules and usages of the society then in force, or which might thereafter be enacted, are part of the contract between the member and the society. The contract, therefore, provided that the member should be bound by all the laws that were legally enacted by the petitioner subsequent to the time of the issuance of his benefit certificate. *Hall* v. *Association*, 69 Neb. 601; *Funk* v. *Stevens*, 102 Neb. 681; *Knights of Pythias* v. *Mims*, 241 U. S. 574; *Apitz* v. *Supreme Lodge*, 274 Ill. 196; *Steen* v. *Modern Woodmen*, 296 Ill. 104; *Thomas* v. *Knights of Maccabees*, 85 Wash. 665; *Hollingsworth* v. *Supreme Council*, 175 N. C. 615; *Reynolds* v. *Supreme Council*, 192 Mass. 150; *Case* v. *Supreme Tribe*, 106 Neb. 220; *Supreme Lodge* v. *Smyth*, 245 U. S. 594; *Langnecker* v. *Grand Lodge*, 111 Wis. 279; *Norton* v. *Catholic Order of Foresters*, 138 Ia. 464; *Korn* v. *Mutual Assurance Society*, 6 Cranch 192; *Crites* v. *Modern Woodmen*, 82 Neb. 298; *Hartford Life Insurance Co.* v. *Ibs*, 237 U. S. 662; *Supreme Council* v. *Green*, 237 U. S. 531; *Hartford Life Insurance Co.* v. *Barber*, 245 U. S. 146.

The statutes of the State of incorporation, the charter or articles of association, benefit certificate and laws of

the society enter into and are parts of the contract of membership between a fraternal beneficiary society and its membership. *Baldwin* v. *Begley*, 185 Ill. 180; *Fulenweider* v. *Royal League*, 180 Ill. 621; *Sabin* v. *Phinney*, 134 N. Y. 423; *Shipman* v. *Protected Home Circle*, 174 N. Y. 398; *Union Mutual Association* v. *Montgomery*, 70 Mich. 587; *Supreme Lodge* v. *LaMalta*, 95 Tenn. 157; *Gaines* v. *Supreme Council*, 140 Fed. 978; *Van Schoonhoven* v. *Curley*, 86 N. Y. 187; *Sharpe* v. *Grand Lodge*, 108 Neb. 193; *Farmers* v. *Kinney*, 64 Neb. 808; *Relfe* v. *Rundle*, 103 U. S. 222; *Kirkpatrick* v. *Modern Woodmen*, 103 Ill. App. 468.

The provisions of the Constitution and of the act of Congress by which the judgments of one State are to have faith and credit given them in another State establish a rule of evidence rather than of jurisdiction. *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265; *Steen* v. *Modern Woodmen, supra; Harrison* v. *Insurance Co.*, 102 Ia. 112; *Russ* v. *War Eagle*, 14 Ia. 363; *Mobile, Jackson & P. C. R. R. Co.* v. *Turnipseed*, 219 U. S. 35;

There is no vested right in a rule of evidence, and parties may by contract provide that a different rule shall apply in determining controversies that may arise between them. *Roeh* v. *Business Men's Association*, 164 Ia. 199; *Steen* v. *Modern Woodmen, supra; Chicago, B. & Q. R. R.* v. *Jones*, 149 Ill. 361; *Lundberg* v. *Interstate Business Men's Ass'n.*, 162 Wis. 474; *People* v. *Rose*, 207 Ill. 352; *Chicago Transfer R. R.* v. *Chicago*, 217 Ill. 343; *Munn* v. *Illinois*, 94 U. S. 113; *Western Union* v. *Comm. Mill Co.*, 218 U. S. 406; *Martin* v. *Railroad Co.*, 208 U. S. 284.

The petitioner in transacting business in its home State is controlled by its charter, as interpreted by the courts of such home State, and, in a like manner when it transacts business in a State other than the State of its incorporation, it necessarily carries its charter with it, for that is the law of its existence. *Royal Arcanum* v. *Green*,

237 U. S. 531; *Reynolds* v. *Arcanum,* 192 Mass. 150; *Hartford Life Ins. Co.* v. *Ibs,* 237 U. S. 662; *Hollingsworth* v. *Supreme Council* 175 N. C. 615; *Sovereign Camp W. O. W.* v. *Wirts,* 254 S. W. (Tex.) 637; *McClement* v. *Supreme Court I. O. F.,* 222 N. Y. 470; *Supreme Council* v. *Gallery,* 278 Fed. 500; *Canada Southern R. R.* v. *Gebhard,* 109 U. S. 527; *Nashua Sav. Bank* v. *Anglo-American Loan Co.,* 189 U. S. 221; *Bernheimer* v. *Converse,* 206 U. S. 516; *Palmer* v. *Welsh,* 132 Ill. 141; *Supreme Lodge* v. *Hine,* 82 Conn. 315; *Supreme Colony* v. *Towne,* 87 Conn. 644; *Relfe* v. *Rundle,* 103 U. S. 222; *North American Union* v. *Johnson,* 142 Ark. 378.

The right of a corporation to modify the terms of a contract of membership depends upon the power of the corporation. *Supreme Lodge K. of P.* v. *Knight,* 117 Ind. 489; *Wright* v. *Minnesota Mutual Life Ins. Co.,* 193 U. S. 657; *Korn* v. *Society,* 6 Cranch 192; *Society* v. *Korn,* 7 Cranch 396.

The full faith and credit clause requires that the public acts of every State shall be given the same effect by the courts of another State that they have by law and usage at home. *Smithsonian Institute* v. *St. John,* 214 U. S. 19; *Railroad Co.* v. *Wiggins Ferry Co.,* 119 U. S. 615; *Hancock National Bank* v. *Farnam,* 176 U. S. 640; *Flash* v. *Conn,* 109 U. S. 371; *Royal Arcanum* v. *Green,* 237 U. S. 531; *Graham* v. *First National Bank,* 84 N. Y. 393; *Canada Southern R. R.* v. *Gebhard,* 109 U. S. 527.

If the legislature has not limited the charter powers of foreign beneficiary societies, the charter as interpreted by the courts of the home State is controlling. *Thomas* v. *Matthiessen,* 232 U. S. 221; *Nat. Bldg. & Loan Assn.* v. *Brahan,* 193 U. S. 635; *New York Life Ins. Co.* v. *Cravens,* 178 U. S. 389; *Pinney* v. *Nelson,* 183 U. S. 144; *Knights of Pythias* v. *Meyer,* 265 U. S. 30; *Nelson* v. *Nederland Life Ins. Co.,* 110 Ia. 600; *American Fidelity Co.* v. *Bleak-*

ley, 157 Ia. 442; *Dworak* v. *Supreme Lodge*, 101 Neb. 297; *Dolan* v. *Supreme Council*, 152 Mich. 266; *Weiditschka* v. *Maccabees*, 188 Ia. 183; *Dennis* v. *Modern Brotherhood*, 119 Mo. App. 210; distinguishing *McElroy* v. *Insurance Co.*, 84 Neb. 866; *Rye* v. *New York Life Ins. Co.*, 88 Neb. 707; *Mutual Life Insurance Co.* v. *Cohen*, 179 U. S. 262; *Mutual Life Ins. Co.* v. *Hill*, 193 U. S. 551; *American Fidelity Co.* v. *Bleakley*, 157 Ia. 442; *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530.

Mr. J. J. McCarthy and *Mr. George W. Leamer* for respondent, submitted.

The case should have been brought up by a writ of error instead of certiorari. Judicial Code § 237, as amended by Act of Feb. 17, 1922, 42 Stat. 366.

The contract sued upon was delivered and first became effective in the State of South Dakota. There is neither pleading nor proof as to the laws of that State. The law of South Dakota is therefore presumed to be the same as the law of Nebraska. This is true as to both statutory and common law. *Stark* v. *Olsen*, 44 Neb. 646; *Council Bluffs* v. *Griswold*, 50 Neb. 753; *Bannard* v. *Duncan*, 79 Neb. 189; *Haggin* v. *Haggin*, 35 Neb. 375; *Scroggin* v. *McClelland*, 37 Neb. 644; *Chapman* v. *Brewer*, 43 Neb. 890; *Smith* v. *Mason*, 44 Neb. 610.

The presumption must therefore be indulged that the by-law relied upon by the appellant is, under the law of South Dakota, unreasonable, void and of no effect; because that is the conclusion reached by the court of Nebraska. *Mixer* v. *M. W. A.*, 197 N. W. 129 (this case); *Garrison* v. *M. W. A.*, 105 N. W. 25; 178 N. W. 842.

The contract in suit should be construed and enforced according to the law of the place where made.

The record shows that the insured made application to the local camp at Elk Point, South Dakota, to become a

member thereof, and provided in his application that no right should accrue to him until he had been adopted and made the payments required at adoption, and that the certificate should only be delivered to him after adoption, all in accordance with the by-laws of the society; and the endorsement upon the certificate shows that this is what was done, and that when he was adopted into the local camp the certificate was delivered to him and he accepted it and paid the dues and charges required. So that all of the acts which made the certificate a contract took place in South Dakota, and not in the State of Illinois, the appellant acting by and through its local camp and the officers thereof as its agents, and the insured acting for himself. It is therefore quite immaterial that the Constitution of the United States provides that full faith and credit must be given to certain records and acts of each State when they become important in some other State.

The general rule is that the construction of a contract of insurance and the rights and obligations of the parties thereto must be determined by the law of the place where the contract is made. *Equitable Life Assurance Society* v. *Pettus,* 140 U. S. 228; *Mutual Life Ins. Co.* v. *Cohen,* 179 U. S. 263; *Supreme Council* v. *Meyer,* 198 U. S. 508; *Life Ins. Co.* v. *McCue,* 223 U. S. 234; *Ingersol* v. *Ins. Co.,* 156 Ill. App. 568; *Wilde* v. *Wilde,* 95 N. E. 295; *Green* v. *Supreme Council,* 124 N. Y. S. 398; *Head* v. *Ins. Co.,* 147 S. W. 827 (Mo.).

The rule of law in Nebraska is that seven years of unexplained absence is presumption of death, and this petitioner attempted by a private contract in the way of a by-law to change the law of Nebraska. Nebraska courts have held this by-law unreasonable. If Nebraska shall be compelled to follow the Illinois decision, then all foreign corporations will have an advantage over domestic corporations.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit by the beneficiary of a certificate issued by a fraternal beneficiary society incorporated in Illinois. The member to whom the certificate was issued was the plaintiff's husband and the ground of recovery is that the husband had disappeared and had not been heard of for ten years before this suit was brought. His expectancy of life according to the tables had not expired and the defence is a by-law of the Corporation to the effect that "long continued absence of any member unheard of shall not . . . give any right to recover on any benefit certificate . . . until the full term of the member's expectancy of life, according to the National Fraternal Congress Table of Mortality, has expired, . . . and this law shall be in full force and effect any statute of any state or country or rule of common law of any state or country to the contrary notwithstanding."

The only facts that need be mentioned are that the certificate seems to have been issued in South Dakota, although there was no allegation or proof concerning the law of that State, and that it was issued in 1901, while the by-law relied upon was not adopted until 1908. But the by-law has been held valid and binding upon the members of the Corporation by the Supreme Court of Illinois, although they had become members before the change. *Steen* v. *Modern Woodmen of America*, 296 Ill. 104. The Supreme Court of Nebraska affirmed a judgment for the plaintiff, seemingly, from the cases cited, on the ground either that the rule of evidence must be determined by the *lex fori*, or, more probably, that the by-law was unreasonable. 197 N. W. 129. The result is that if the validity of the by-law ought to be determined by the laws of Illinois, the plaintiff is allowed to recover upon a state of facts which the contract expressly stipu-

lates shall not give her that right. A writ of certiorari was issued by this Court. 265 U. S. 576.

The indivisible unity between the members of a corporation of this kind in respect of the fund from which their rights are to be enforced and the consequence that their rights must be determined by a single law, is elaborated in *Supreme Council of the Royal Arcanum* v. *Green*, 237 U. S. 531, 542. The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicil, membership looks to and must be governed by the law of the State granting the incorporation. We need not consider what other States may refuse to do, but we deem it established that they cannot attach to membership rights against the Company that are refused by the law of the domicil. It does not matter that the member joined in another State. In the above cited case Green became a member of a Massachusetts corporation in New York, and the State Court held on ordinary principles of contract that his rights were governed by New York law. *Green* v. *Royal Arcanum*, 206 N. Y. 591, 597. But the decision was reversed and it was held a failure to give full faith and credit to the Massachusetts charter as construed by the Massachusetts Court that Green was relieved by decree from paying assessments increased by the corporation after his contract was made. We are of opinion that the decision in that case governs this, and that the judgment must be reversed.

Judgment reversed.